No. 98-83-CFX

Title: Charles H. Wilson, et ux., et al., Petitioners
v.
Harry Layne, Deputy United States Marshal, etc., et al.

Docketed:
July 15, 1998

Court: United States Court of Appeals for the Fourth Circuit

| Entry | Date | Proceedings and Orders |
|---|---|---|
| | Jul 7 1998 | Petition for writ of certiorari filed. (Response due August 14, 1998) |
| | Aug 17 1998 | Waiver of right of respondents Harry Layne, et al. to respond filed. |
| | Aug 19 1998 | DISTRIBUTED. September 28, 1998 |
| | Sep 2 1998 | Response requested. |
| | Oct 2 1998 | Brief of respondents Harry Lanye, et al. in opposition filed. |
| | Oct 13 1998 | Reply brief of petitioners Charles Wilson, et ux., et al. filed. |
| | Oct 14 1998 | REDISTRIBUTED. October 30, 1998 |
| | Nov 2 1998 | REDISTRIBUTED. November 6, 1998 |
| | Nov 9 1998 | Petition GRANTED. limited to the following questions: 1. Whether law enforcement officers violate the Fourth Amendment by allowing members of the news media to accompany them and to observe and record their execution of a search warrant? 2. Whether, if this action violates the Fourth Amendment, the officers are nonetheless entitled to a defense of qualified immunity? The case is consolidated with No. 97-1927, Hanlon v. Berger, and a total of one hour is allotted for oral argument. SET FOR ARGUMENT March 24, 1999. |
| | | ********** |
| | Dec 28 1998 | Joint appendix filed. |
| | Dec 28 1998 | Brief of petitioners Charles Wilson, Geraldine Wilson, et al. filed. |
| | Dec 28 1998 | Brief amici curiae of ABC, Inc., et al. filed. VIDED. |
| | Jan 27 1999 | Brief of respondents Mark A. Collins, Eric Runion, and Brian Roynestad filed. |
| | Jan 27 1999 | Brief of respondents Harry Layne, James Olivo, and Joseph Perkins filed. |
| | Feb 8 1999 | Motion of the parties respecting oral argument filed. |
| | Feb 11 1999 | CIRCULATED. |
| | Feb 22 1999 | Motion of the parties respecting oral argument GRANTED. and the time is allotted as follows: 20 minutes for petitioners Hanlon, et al., in No. 97-1927 and federal respondents Layne, et al., in No. 98-83; 10 minutes for state respondents Collins, et al., in No. 98-83; 15 minutes for respondents Berger, et ux., in No. 97-1927; and 15 minutes for petitioners Wilson, et al., in No. 98-83. |
| | Mar 1 1999 | A total of ten additional minutes for oral argument are allotted to petitioners Hanlon, et al.; federal respondents Layne, et al.; and state respondents. A total of ten additional minutes for oral argument are |

2 pp

| Entry | Date | Proceedings and Orders |
|---|---|---|
| | | allotted to respondents Berger, et ux. and petitioners Wilson, et al. |
| | Mar 1 1999 | Reply brief of petitioners Charles Wilson, Gerald Wilson, et al. filed. |
| | Mar 11 1999 | Record filed. |
| | Mar 12 1999 | Record filed. |
| | Mar 24 1999 | ARGUED. |

No. 98-83

In The

# Supreme Court of the United States



October Term, 1997

CHARLES WILSON, GERALDINE WILSON and RACHEL SNOWDEN, next friend/mother of VALENCIA SNOWDEN, a minor,

*Petitioners,*

*vs.*

HARRY LAYNE, JAMES A. OLIVO, JOSEPH L. PERKINS, MARK A. COLLINS, ERIC E. RUNION and BRIAN E. ROYNESTAD,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit*

## PETITION FOR WRIT OF CERTIORARI

RICHARD K. WILLARD
*Counsel of Record*
DAVID H. COBURN
JAMES S. FELT
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 429-3000

RICHARD SELIGMAN
601 Indiana Avenue, Suite 910
Washington, DC 20004
(202) 745-7800

*Attorneys for Petitioners*

*Of Counsel:*

ARTHUR B. SPITZER
AMERICAN CIVIL LIBERTIES UNION of the National Capital Area
1400 20th Street, N.W.
Washington, DC 20036
(202) 457-0800

147133

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, Inc.

## QUESTION PRESENTED

Whether law enforcement officers executing a warrant violate clearly established Fourth Amendment principles when they bring members of the press into a private home without the occupants' consent.

## PARTIES TO THE PROCEEDING

The names of all of the parties appear in the caption.



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**APPENDIX**

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Petitioners Charles and Geraldine Wilson and their granddaughter, Valencia Snowden, respectfully petition for a writ of certiorari to review the *en banc* decision of the United States Court of Appeals for the Fourth Circuit.

## OPINIONS BELOW

The *en banc* opinion of the United States Court of Appeals for the Fourth Circuit (App. A) is reported at 141 F.3d 111. The panel opinion (App. B) is reported at 110 F.3d 1071. The district court's oral opinion (App. C) is unreported.

## STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on April 8, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## STATEMENT OF THE CASE

### A. Factual Background[1]

On April 14, 1992, the Circuit Court for Montgomery County, Maryland issued a bench warrant for the arrest of Dominic Jerome Wilson based on an alleged violation of probation. The warrant permitted "any duly authorized peace officer" to arrest Dominic Jerome Wilson. App. 4a, 18a.

Two days later, on the morning of April 16, 1992, at approximately 6:45 a.m., Charles and Geraldine Wilson were lying in bed when they heard loud, persistent knocking on their front door. Mr. Wilson got out of bed to investigate. App. 20a-21a.[2]

When Mr. Wilson reached his living room he was confronted by respondents Perkins, Olivo, and Collins with their guns drawn. The officers were dressed in plain clothes. Paul Valentine and Margaret Thomas, a *Washington Post* reporter and photographer, respectively, were with them. App. 5a, 21a, 69a.

Mr. Wilson raised his hands in the air and respondents ordered him to lie on the floor. As he was complying, his wife entered the living room. The officers questioned the Wilsons concerning the whereabouts of Dominic Wilson, the Wilsons'

1. As stated by Judge Wilkins in the majority opinion, the material facts are not disputed. Petitioners' Appendix ("App.") 4a. The facts set forth in this section were all included in the Joint Appendix below. Where a fact is explicitly set forth in an opinion, citations are made to the page of the opinion as it appears in Petitioners' Appendix. To the extent no reference has been made to a particular fact in an opinion, citations are to the Joint Appendix ("J.A.") below.

2. The opinion below mistakenly identifies the date of the raid on the Wilson home as April 14, 1992. The correct date is April 16, 1992. App. 68a.



adult son. Mr. Wilson told the deputies that he was not Dominic, that Dominic did not live there, and that he had not seen Dominic for at least two weeks. Mrs. Wilson identified Mr. Wilson as her husband and confirmed that Dominic was not there. App. 5a, 69a; J.A. 89, 108.

Just prior to entering the Wilson home, the officers had reviewed an arrest worksheet and photographs of Dominic Wilson that showed him to be 27 years old, 185 pounds, and clean-shaven. On April 16, 1992, Charles Wilson was 47 years old, weighed 220 pounds and had a beard that was almost completely white. The officers were quickly aware that Charles Wilson was not Dominic. App. 64a, 69a; J.A. 142.

Perkins cursed at and threatened to arrest Charles Wilson if Dominic was found in the house. He then searched the home while Collins unlatched the back door to let in respondents Runion and Roynestad. Nobody else was in the house. App. 5a, 70a; J.A. 109.

The reporters remained in the Wilson home without the consent of the Wilsons. Ms. Thomas took photographs throughout the encounter, including photographs of Mr. Wilson, who was wearing only his underpants, and of Mrs. Wilson, who was wearing a sheer nightgown. She also took photographs of Mr. Wilson being forcibly detained, belly-down on his living room floor with Olivo's knee in his back and gun to his head. At no time were the Wilsons permitted to cover themselves decently. App. 4a-5a; 21a-22a, 63a-64a.

No deputy ever asked or instructed the reporters to leave the Wilson home. The reporters were permitted to stay in the house throughout the encounter, including after it was confirmed that Mr. Wilson was not Dominic and that Dominic was not there. They continued to remain in the Wilson home after Mr. Wilson asked everyone to leave. App. 63a-64a; J.A. 107-08.

Respondent Layne was a deputy U.S. Marshal and Washington, D.C. area site supervisor of Operation Gunsmoke, a joint federal/state effort by the U.S. Marshal's Service and local law enforcement agencies to apprehend fugitives. In this case, the local law enforcement agency was the Montgomery County, Maryland Sheriff's Department. App. 67a.

Layne assigned the media personnel to the Operation Gunsmoke team that entered the Wilson home. The reporters rode along with respondents as part of a two-week newsgathering activity by the *Washington Post*. App. 4a-5a. Layne provided the team with no guidance limiting the taking of the press into private residences, and some of the individuals on the team (all of whom are respondents) have admitted that they were aware of no authority that permitted them to bring the press with them into private residences. J.A. 119, 131-32. They have also admitted, and the district court found, that the press were not present at the Wilson home on April 16, 1992 to serve any law enforcement purpose. App. 21a; J.A. 107, 119-20, 132-33. Nonetheless, the officers actively invited and assisted the press to enter the home. Respondents placed no limits on what the reporters saw or did. App. 21a, 76a; J.A. 83, 119.

After the officers and reporters left the Wilson home, the Wilsons were able to locate Dominic at his girlfriend's apartment. They instructed him to walk to a nearby police station to turn himself in, which he immediately did. J.A. 81.

**B. Legal Proceedings**

The Wilsons brought a *Bivens* action in the District Court of Maryland alleging, among other things, that respondents' police-led media invasion violated their Fourth Amendment right to be secure in their home against unreasonable searches and seizures.



Respondents moved for summary judgment on qualified immunity grounds. The district court denied the motion relying primarily on *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995), and *Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995). The district court found that the media intrusion in this case was clearly violative of well-established Fourth Amendment principles preserving the sanctity of the home, such as the specific warrant requirement. The district court further determined that the search of the Wilson home was objectively unreasonable due to the media's presence and that their participation in the search served no legitimate law enforcement purpose. *See* App. C.

Respondents brought an interlocutory appeal. In a 2 to 1 decision, a panel of the Court of Appeals reversed the district court. The majority found that a reasonable officer would not necessarily have understood that bringing the media into a private dwelling to observe the execution of a warrant violated any clearly established right. *See* App. B.

Petitioners filed a timely suggestion for rehearing *en banc*, which was granted. Oral argument was held before the *en banc* court on September 30, 1997. A majority of active judges then voted for a rehearing and a second *en banc* argument was heard on March 3, 1998. Judge Donald Russell, the dissenting judge on the original panel, passed away shortly before the second *en banc* argument. The final vote of the court was 6 to 5 to reverse the district court.

The majority defined the specific right alleged to be violated as the Wilsons'

> Fourth Amendment right to avoid unreasonable searches and seizures resulting from the officers' decision to permit members of the media who were not authorized to execute the warrant to enter into a private residence, without the homeowners' consent,

> to observe and photograph the execution of an arrest warrant.

App. 8a. The question before the court, then, was "whether in April 1992 this right was clearly established and whether a reasonable officer would have understood that the conduct at issue violated it." *Id.*

The majority's analysis begins with the observation that the reporters did nothing that the officers themselves could not have done consistent with the terms of the arrest warrant. The Fourth Circuit then concluded that

> reasonable officers under these circumstances had no clearly established law from the Supreme Court, this court, or the Court of Appeals of Maryland [where the underlying events occurred] from which they necessarily understood that they exceeded the scope of an arrest warrant by permitting reporters to engage in activities in which they themselves could have engaged consistent with the warrant.

App. 9a-10a.

Further, the majority found, a reasonable law enforcement officer could have believed that having the media along served a legitimate law enforcement purpose related to the execution of the warrant. A five-member plurality of the Court hypothesized that, for example, having the media present may afford protection by reducing the chance that a target of a warrant will resist arrest in the face of recorded evidence of his actions, or would improve public oversight and thus deter crime and improper police conduct. App. 10a. [3]

3. Judge Widener did not join the portion of the majority opinion providing these examples of legitimate law enforcement purposes in furtherance of the (Cont'd)



Judge Murnaghan wrote a dissenting opinion in which four other members of the Court joined. The dissent carefully examined whether there are Fourth Amendment principles that are so clearly established that the unlawfulness of respondents' conduct would have been apparent to a reasonable law enforcement officer. The dissenters concluded that there are. At common law and throughout the history of Fourth Amendment jurisprudence the sanctity of the home has always received the highest protection. In *Silverman v. United States*, 365 U.S. 505, 511 (1961), for example, this Court recognized that at the very core of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion." *See* App. 24a.

The dissent also recounted the history of another well-established Fourth Amendment principle, the specific warrant requirement. As Judge Murnaghan noted, it has long been established that an officer executing a warrant must tailor his conduct "strictly within the bounds set by the warrant." App. 27a. (*quoting Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 394-95 n.7 (1971)). Correspondingly, any action not specifically mentioned in a warrant is unconstitutional unless it is reasonably necessary to further its purposes. App. 27a-28a. In this case, the dissent concluded, that clearly established standard had not been met.

## REASONS FOR GRANTING THE WRIT

This case presents important and timely questions regarding the scope of the Fourth Amendment's protection of the home, and the scope of qualified immunity, on which the circuits have split two to two.

(Cont'd)
execution of the warrant that a reasonable officer could have believed were served by the media's presence. *See* App. 17a (Widener, J., concurring). Thus, only five of the eleven judges joined this part of the opinion.

## I.

## THE CIRCUITS ARE IN CONFLICT OVER WHETHER LAW ENFORCEMENT OFFICERS EXECUTING A WARRANT CONTRAVENE CLEARLY ESTABLISHED CONSTITUTIONAL PRINCIPLES WHEN THEY BRING THE PRESS INTO A PRIVATE HOME FOR NEWSGATHERING PURPOSES.

The decision below squarely conflicts with the Second Circuit decision in *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995) and the Ninth Circuit decision in *Berger v. Hanlon*, 129 F.3d 505 (9th Cir. 1997), *petitions for cert. filed*, 66 U.S.L.W. 3783 (May 26, 1998) (97-1914 and 97-1927).

In *Ayeni*, a Secret Service agent executing a search warrant in New York City invited a CBS television crew from the newsmagazine "Street Stories" into a private home to videotape a search for evidence of credit card fraud. A mother and child, neither of whom was suspected of any wrongdoing, were home alone when the search took place. The camera crew videotaped the mother and child as well as the family's personal effects as the officers conducted their search.

The Second Circuit found the law clearly established that

> law enforcement officers' invasion of the privacy of a home must be grounded on either the express terms of a warrant or the implied authority to take reasonable law enforcement actions related to the execution of the warrant.

*Ayeni*, 35 F.3d at 686. The court upheld District Judge Weinstein's decision that the conduct at issue violated the Fourth



Amendment's prohibition on unreasonable searches and seizures, that the right of the Ayenis to be protected from an agent bringing into their home persons not expressly or impliedly authorized to be there was "clearly established," and that the agent could not reasonably have believed his actions were consistent with the Fourth Amendment. *Id.* [4]

In *Berger*, a CNN camera crew accompanied U.S. Fish and Wildlife Service agents while they executed a search warrant at Paul and Erma Berger's 75,000 acre Montana ranch. At the time of the search, Mr. Berger was 71 and Mrs. Berger was 81. The agents were searching for evidence indicating the taking of wildlife. Mr. Berger was suspected of killing eagles.

CNN did not enter the Berger home, but one of the federal agents who did was wired with a hidden microphone that transmitted live audio to a CNN technical crew. Relying on *Ayeni* and an earlier Fourth Circuit decision, *Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995) (discussed *infra*), the Ninth Circuit concluded that the federal officers were not entitled to qualified immunity.[5]

---

4. A district court in the Third Circuit has followed *Ayeni* in finding that two Philadelphia police officers were not entitled to qualified immunity for bringing two reporters and a photographer from the *Philadelphia Daily News* into a private home to cover the execution of a search warrant. *Hagler v. Philadelphia Newspapers, Inc.*, C.A. No. 96-2154, 1996 WL 408605 (E.D. Pa. July 12, 1996). The court concluded that "a reasonable person would know that the purpose of a warrant is to facilitate proper law enforcement, not to provide a 'photo opportunity.' A search warrant is simply not a press pass." 1996 WL 408605, *2.

5. The present case, unlike *Berger*, involves the more typical situation of the media personnel being brought inside the home without the occupants' consent. Every police/media intrusion case cited herein (other than *Berger*), involves physical entry into the home by the press without consent. Other very recent lawsuits also involve media home intrusions, but not necessarily

(Cont'd)

Two Circuits have ruled the other way.

The Eighth Circuit rejected *Ayeni* in *Parker v. Boyer*, 93 F.3d 445, 447 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997). In *Parker*, police tipped off a local television reporter in St. Louis, Missouri to a weapons investigation. The police drove the reporter and a cameraman to the home of a mother and her sixteen-year-old daughter, neither of whom was suspected of any crime. The target of the warrant was a male relative who was staying with them, but who was not inside the house while the search was being conducted. The cameraman videotaped the mother and daughter and the search of their home. The videotape was then shown on local news broadcasts on four separate days.[6]

In assessing whether clearly established law prohibited such conduct, the Eighth Circuit pointed out that, before the conduct challenged in *Parker* took place, only three cases had addressed the unconstitutionality of press accompanying police executing warrants inside a home.[7] The Eighth Circuit noted that those

(Cont'd)
by the traditional press. Instead, camera crews from "reality-as-entertainment" television shows tag along with law enforcement officers. *See Reeves v. Fox Television Network*, 983 F. Supp. 703 (N.D. Ohio 1997) (occupant of home sued production company of the television show *COPS* for invasion of privacy caused by television camera crew recording encounter with police inside his home); Minerva Canto, *Baseball All-Star's Widow Suing L.A.*, L.A. Daily News, Oct. 10, 1997, *available in* 1997 WL 4055786 (Widow of baseball great Curt Flood sued city, police officers and production company of reality-based show *Placas* for raiding her home during a party "to provide the reality-based show *Placas* with 'exciting footage.' ")

6. These facts are taken from the district court opinion. *See Parker v. Clarke*, 905 F. Supp. 638, 640-41 (E.D. Mo. 1995).

7. *Parker v. Boyer*, 93 F.3d at 447 (citing *Moncrief v. Hanton*, 10 Med. L. Rptr. 1620 (N.D. Ohio Jan. 6, 1984); *Higbee v. Times-Advocate*, 5 Med. (Cont'd)



courts had "rejected the argument that the United States Constitution forbids the media to encroach on a person's property while the police search it." *Id.* The Eighth Circuit, moreover, unlike the Second Circuit, did not think it

> self-evident that the police offend general fourth-amendment principles when they allow members of the news media to enter someone's house during the execution of a search warrant.

*Id.* The court concluded, accordingly, that a reasonable law enforcement officer would not have known that allowing television cameras to participate in a search violated clearly established law. *Id.*

The decision of the Fourth Circuit in the present case accords with the Eighth Circuit's decision in *Parker*. The Fourth Circuit found respondents immune from liability despite its own prior precedent in *Buonocore v. Harris* that found that police officers executing a warrant may not bring telephone company personnel not authorized by the warrant into a home to search for company property unrelated to the warrant. In distinguishing *Buonocore*, the majority characterized the question in *Buonocore* as whether police may constitutionally invite a third party to "undertake an independent search for items not described in the warrant." App. 11a n.6. Petitioners argued below that the *Washington Post* reporters were similarly on an

(Cont'd)
L. Rptr. 2372 (S.D. Cal. Jan. 9, 1980); *Prahl v. Brosamle*, 295 N.W. 2d 768 (Wis. Ct. App. 1980)). *Parker* also cited *Avenson v. Zegart*, 577 F. Supp. 958 (D. Minn. 1984), a case that is inapposite. The *Avenson* plaintiffs claimed that the failure of police officers executing a search warrant to remove the press from their land (not from inside their home) violated their right to equal protection under the law. The court found, for reasons unrelated to the presence of the media, that no equal protection violation was alleged. 577 F. Supp. at 962.

independent search for news and information and photographic images not described in the warrant. Without explaining its reasoning, the majority simply asserted in a footnote that, "[o]f course, the officers here permitted no such general independent search by the reporters." *Id.*

In sum, the present state of the law is that police-led media invasions of private property are clearly unconstitutional in the Second and Ninth Circuits, and not clearly unconstitutional, if unconstitutional at all, in the Fourth and Eighth Circuits.[8]

The fact that so many courts of appeals have just recently ruled on this conduct underscores how it represents a new and growing phenomenon that threatens important privacy interests protected by the Fourth Amendment. Its prevalence is featured in a recent flood of newspaper and law review articles that note, in particular, the recent popularity of "reality-as-entertainment" television shows that regularly broadcast footage of law enforcement encounters with residents in private homes.[9]

8. Neither the Eighth Circuit not the Fourth Circuit ruled on the underlying constitutional issue, limiting their decisions to the question of immunity. The one other court of appeals decision that has addressed the issue of media participation in a search is *Stack v. Killian*, 96 F.3d 159 (6th Cir. 1996). Unlike the other cases, the search warrant in *Stack* authorized "videotaping and photographing." The court concluded that

> even though the warrant said nothing about a television crew, the defendants were justified, under the explicit language of the warrant, in permitting the accompaniment of camera personnel.

96 F.3d at 163. To the extent that *Ayeni* and *Berger* hold that the Fourth Amendment clearly requires that only persons designated in a warrant may execute it, *Stack*, too, conflicts with those decisions. Moreover, in our view, the Fourth Amendment would not permit news media to be brought into a private home even if a warrant so specified.

9. *See* Paul Brownfield, *Reality Shows Raise Question of Privacy*, St. Louis Post-Dispatch, June 23, 1998, *available in* 1998 WL 3340523; Maura Dolan, (Cont'd)



The split in the circuits allows this practice to continue unabated in at least the Fourth and Eighth Circuits,[10] if not elsewhere. As declared This Term, "an immunity determination, with nothing more, provides no clear standard, constitutional or non-constitutional." *County of Sacramento v. Lewis*, 118 S. Ct. 1708, 1714 n.5 (1998). If the standard remains unclear, then, by definition, qualified immunity would apply to immunize law enforcement officers from liability for continuing

(Cont'd)
*The Right to Know vs. The Right to Privacy; With Cameras Following Cops and Accident Scenes Being Broadcast on TV, The Law is Struggling to Keep Up As Tabloid Shows Get More Aggressive*, L.A. Times, Aug. 1, 1997, at A1; David E. Bond, Note, *Police Liability for the "Media Ride-Along,"* 77 B.U. L. Rev. 825 (1997); Sally S. Campbell, Note, *Lights, Cameras, Access: Should the Police Provide the Means for Television Stations to Violate the Fourth Amendment?*, 22 U. Dayton L. Rev. 351 (1997); Recent Case, 110 Harv. L. Rev. 1340 (1997); Brad M. Johnston, Note, *The Media's Presence During the Execution of a Search Warrant: A Per Se Violation of the Fourth Amendment*, 58 Ohio St. L.J. 1499 (1997); Kevin E. Lunday, Note, *Permitting Media Participation in Federal Searches: Exploring the Consequences for the United States Following Ayeni v. Mottola and a Framework for Analysis*, 65 Geo. Wash. L. Rev. 278 (1997); Elsa Y. Ransom, *Home: No Place for "Law Enforcement Theatricals" — The Outlawing of Police/Media Home Invasions in Ayeni v. Mottola*, 16 Loy. L.A. Ent. L.J. 325 (1995).

10. Conversely, the practice should have stopped in the Second and Ninth Circuits. Yet, the Buffalo News reports in its September 1, 1995 edition that four film crews from the show *Cops* followed Buffalo police officers and Erie County sheriff's deputies during the month of July, 1995, almost one year after the *Ayeni* decision. Although the article does not say whether the camera crews went into people's homes, it recounts the story of a local college professor who was videotaped in his doorway by a camera crew that followed police onto his front porch. When he asked about the cameras, the professor was told that the footage was for a police training film. Only later did he find out its true purpose. Tom Buckham, *Activist Drops Suit After Part of 'COPS' Video is Erased; Case Prompts Some to Criticize City For Bargaining With Producers of Show*, Buffalo News, Sept. 1, 1995, *available in* 1995 WL 5498681.

to bring the media into private homes without the occupants' consent. The threat is particularly serious for citizens living in circuits that look only to the law of their own circuit in assessing whether a right is clearly established. If officials were to raid the Wilson home again tomorrow, for example, the Wilsons would not, under Fourth Circuit law, be able to rely on *Ayeni* or *Berger* to show that their right to be free from such conduct was clearly established. *See* App. 7a ("The law is clearly established . . . when the law has been authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the state.")[11] This issue needs to be authoritatively decided by this Court.

## II.

## THE DECISION BELOW VIOLATES THIS COURT'S SETTLED FOURTH AMENDMENT PRECEDENTS REGARDING THE PERMISSIBLE SCOPE OF A SEARCH PURSUANT TO AN ARREST WARRANT.

The Fourth Amendment "confines an officer executing a search warrant strictly within the bounds set by the warrant."

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11. *See also Cullinan v. Abramson*, 128 F.3d 301, 311 (6th Cir. 1997) (explaining that "[o]rdinarily, at least, in determining whether a right is 'clearly established' this court will not look beyond Supreme Court and Sixth Circuit precedent"), *cert. denied*, 118 S. Ct. 1560 (1998); *Jenkins v. Talladega City Bd. of Ed.*, 115 F.3d 821, 826 n.4 (11th Cir. 1997) (*en banc*) (explaining that "the law can be 'clearly established' for qualified immunity purposes only by decisions of the U.S. Supreme Court, [the] Eleventh Circuit Court of Appeals, or the highest court of the state where the case arose"), *cert. denied*, 118 S. Ct. 412 (1997). *But see Lum v. Jensen*, 876 F.2d 1385, 1387 (9th Cir. 1989), *cert. denied*, 493 U.S. 1057 (1990) ("Absent binding precedent, we look to all available decisional law"); *Cleveland-Perdue v. Brutsche*, 881 F.2d 427, 431 (7th Cir. 1989), *cert. denied*, 498 U.S. 949 (1990) (same); *Melear v. Spears*, 862 F.2d 1177, 1184 n.8 (5th Cir. 1989) ("[r]elying solely on Fifth Circuit and Supreme Court cases, for example, would be excessively formalistic").



*Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 394 n.7 (1971). The arrest warrant in this case not only identified the individual who the officers were entitled to search for and seize, but also those who were entitled to search for and seize him: "duly authorized peace officer[s]." There was no express authorization in the warrant for the media to search for or seize anyone. The warrant also did not expressly authorize anyone, including the media, to search for or seize news, information, photographic images, or anything else. The only "item" that anyone was expressly authorized to search for and seize was Dominic Jerome Wilson. Clearly, the warrant carried with it no express authorization for law enforcement officials to bring the media with them inside the Wilson home for independent, newsgathering purposes.

Absent express authorization, clearly established law required that authorization either be: (1) implied by the terms of the arrest warrant, *see Michigan v. Summers*, 452 U.S. 692, 705 (1981); or (2) supplied by one of the clearly delineated exceptions to the warrant requirement. *See Coolidge v. New Hampshire*, 403 U.S. 443, 489 (1971).

No exception to the warrant requirement for media news searches has ever been recognized by this Court, nor have respondents so claimed. The absence of a recognized exception to the specific warrant requirement establishes that these officers violated clearly established law: searches of private homes must be authorized by warrant, and must remain strictly confined to the scope the warrant describes.

Neither was the media entry authorized under the implicit-authority doctrine of *Summers*. *Summers* held that officers executing a search warrant for contraband had implicit, limited authority to detain occupants of the premises while the search was being conducted. The detention was justified by: (1)

legitimate law enforcement purposes (safety of the officers and prevention of flight); and (2) articulable and individualized suspicion that the detained person harbored contraband. 452 U.S. at 705.

*Summers* cannot be read to do anything more than to permit an officer to take steps that are not spelled out in the warrant, but which must be taken in order to effectuate the warrant's purposes. The narrow holding in *Summers* is underscored by the case upon which *Summers* relies, *Payton v. New York*, 445 U.S. 573 (1980). *Payton* recognized the implicit, "limited authority [of an arrest warrant] to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." *Payton*, 445 U.S. at 603. The ability to enter a house is, of course, necessary to arrest someone who, for example, refuses to leave it.

The law enforcement interests at stake here cannot seriously (and certainly not reasonably) be compared to those at stake in *Summers* and *Payton*. The interests, if any, are slight, remote and wildly speculative. A plurality of Fourth Circuit judges, however, managed to conjure up two examples of legitimate law enforcement interests that they thought a "reasonable officer" might have believed were served by having the press along. The examples provided by the plurality, even if legitimate, are so distant from the purposes that permitted the officers to be inside the Wilson home that, if accepted, they would effectively eliminate any restrictions imposed by a warrant's limited scope, and thus wholly ignore this Court's established prohibition on general warrants. Under the plurality's standard, the limited scope of an express warrant becomes meaningless in the face of an officer's — or court's *post hoc* — speculation as to whether even a nebulous and remote law enforcement purpose would be served by expanding a search beyond a warrant's scope.



The plurality speculated that a suspect would behave herself in the face of recorded evidence of her actions. The easy response to this point is that if a reasonable officer actually believed that stillshot photography was necessary to deter misconduct, then the officers themselves might have taken photographs. Having the press, as opposed to the police, take the pictures intensifies the privacy invasion without corresponding gain in advancing any law enforcement purpose. In any event, as the dissent correctly observed, it is "absurd" to suggest that a reasonable officer could have concluded that the media's presence afforded assistance.[12]

The second law enforcement purpose related to the warrant that the plurality identified was that the media's presence contributed to accurate reporting of law enforcement activities which in turn helps deter crime and police misconduct. As important as that media function may be, in this context it is an exception that would effectively swallow the Court's traditional rules regarding the sanctity of the home and the importance of the warrant requirement. Moreover, it has nothing to do with furthering the purposes of the specific warrant at issue, which *Summers* requires.[13]

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12. The dissent further explained:

> The reporters might also have helped by carrying the warrant while the officers handcuffed suspects, or by holding the door open for an officer while he was carrying contraband; but to uphold the police actions because of the potential for fortuitous assistance, despite clearly not being designed to serve law enforcement, would make a mockery of the rule that an officer's actions are limited to the scope authorized by the warrant. The exceptions to this strict limitation permit only those actions reasonably necessary to accomplish the purpose of the warrant.

App. 33a-34a (citations omitted).

13. The dissent also attacks this media supervision justification:

(Cont'd)

Finally, even if the presence of the press in petitioner's home did not violate the Warrant Clause, the reasonableness requirement of the Fourth Amendment would still demand that the law enforcement interest be more than merely negligible, but indeed sufficient to justify the invasion of petitioners' privacy. *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 619 (1989). The Fourth Circuit never engaged in any reasonableness analysis. Instead, the decision below essentially ignored the cherished Fourth Amendment protections of those inside their homes that were trampled in this case. And, it paid no heed to the principle that "greater intrusiveness requires greater justification." Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles* 35 (1997).

As this Court has often observed, "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States District Court*, 407 U.S. 297, 313 (1972). "A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle." *Silverman v. United States*, 365 U.S. 505, 511-12 n.4 (1961) (quotation omitted). The zone of privacy enjoyed by citizens is never more clearly defined "than

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(Cont'd)

> If, for example, the police officers had a warrant to perform a body cavity search on Mrs. Wilson, the majority implies that they could have believed the warrant authorized them to allow members of the public to watch. . . . Such a search would be patently unreasonable. . . . In today's case the majority finds that it was not clearly unreasonable for a police officer to force at gunpoint a citizen in his underwear to pose for a camera, potentially to be exhibited to the entire viewing readership of the *Washington Post*. This, too, was patently unreasonable.

App. 41a-42a.



when bounded by the unambiguous physical dimensions of an individual's home." *Payton*, 445 U.S. at 589.

The conduct involved in this case was especially destructive of privacy. It is humiliating enough to have a squad of law enforcement officers invade your home at 6:45 a.m. But the invasion of privacy is substantially aggravated when the officers invite the press to record the encounter for possible future publication to the general public. If inmates in prison "are not like animals in a zoo to be filmed and photographed at will by the public or by media reporters." *Houchins v. KQED, Inc.*, 438 U.S. 1, 5 n.2 (1978) (plurality opinion), then photographing innocent people in their homes *obviously* violates fundamental privacy rights. No reasonable officer could have believed otherwise.

## III.

## THE CIRCUITS ARE IN CONFLICT OVER WHETHER PETITIONERS' RIGHT WAS CLEARLY ESTABLISHED AT THE REQUISITE LEVEL OF SPECIFICITY TO OVERCOME QUALIFIED IMMUNITY.

The Fourth Circuit relied on an overly demanding interpretation of qualified immunity to find petitioners' rights insufficiently well established. The court held that

> even if we were to agree with the Wilsons that in 1992 it was clearly established that the Fourth Amendment was violated if officers permitted third parties who were not expressly authorized by the warrant and who were not assisting reasonable law enforcement efforts related to the execution of the warrant to accompany them into a residence, we could not conclude that it was clearly established that the conduct in which these officers engaged manifestly fell within the ambit of that rule.

App. 10a. In other words, the court of appeals held that this Court's constitutional rule may have been clear as a general matter, but it had yet to be elaborated with the requisite factual specificity to satisfy the Fourth Circuit's qualified immunity standard, which would require cases specifically establishing that "permitting reporters to observe the events surrounding the execution of an arrest warrant" is unconstitutional. That holding conflicts with this Court's decisions and with decisions of other circuits, including, most squarely, the Second Circuit in *Ayeni* and the Ninth Circuit in *Berger*.[14]

The Fourth Circuit's qualified immunity standard requires a level of specificity in an articulation of a constitutional right that this Court has rejected. *Anderson v. Creighton*, 483 U.S. 635 (1987), addressed the question of how particularly defined a right must be in order for it to be "clearly established":

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has been previously held unlawful, but it is to say that in light of preexisting authority the unlawfulness must be apparent.

14. *See also Martin v. Heideman*, 106 F.3d 1308, 1312-13 (6th Cir. 1997) (reversing district court decision that law on excessively forceful handcuffing was not clearly established, and referring instead to "the general excessive force rubric"); *Bonitz v. Fair*, 804 F.2d 164, 172 (1st Cir. 1986) ("For a legal norm to be clearly established, it does not require 'specific judicial articulation.' "); *Hobson v. Wilson*, 737 F.2d 1, 29 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985) ("[T]o require a prior Supreme Court holding on the particular facts of this case would not only immunize but actually reward the government for inventing and pursuing ever more egregious conduct. Indeed, there never could be such a ruling from the Court, because *Harlow* would always immunize government actors.")



*Id.* at 640 (citations omitted). In *United States v. Lanier*, 117 S. Ct. 1219 (1997), the Court directly addressed the question whether the right that has been defined in general terms, and applied in only factually distinguishable circumstances, can nonetheless clearly establish the law. The Court held that it can.[15] *Lanier* expressly rejected the Sixth Circuit's standard in that case, which was essentially identical to the court of appeals' standard in this case.

*Lanier* explained that "notable factual distinctions between the precedents relied on" and the cases before the court are acceptable "so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *Id.* at 1227. This Court added that "general statements of the law are not inherently incapable of giving fair and clear warning," and "a general constitutional rule already defined in the decisional law may apply with obvious clarity to the specific conduct in question." *Id.* The Court condemned the court of appeals' demand for factually analogous precedents, stating that "all that can usefully be said" is that liability may be imposed only if "in light of clearly established law the unlawfulness is apparent." *Id.* at 1228 (quoting *Anderson*, 483 U.S. at 640). The court of appeals' requirement in this case that petitioners point to precedent construing their Fourth Amendment rights in the context of press not authorized by warrant accompanying police officers into private homes for newsgathering purposes squarely conflicts with *Anderson* and *Lanier*.

15. *Lanier* arose in the context of a criminal prosecution under 18 U.S.C. § 242, which establishes criminal liability for willful violations of constitutional rights. In defining the level of specificity required in order to fulfill the due process requirement of "fair warning," *Lanier* expressly equated the Section 242 standard with the "clearly established" standard under qualified immunity law. *Lanier* was issued after the panel decision below and relied upon by petitioners in their Suggestion for Rehearing In Banc. Although rehearing was granted, the court ultimately ignored *Lanier* in its decision.

The qualified immunity holding of *Ayeni* is in harmony with *Anderson* and *Lanier* and directly at odds with the holding in this case. Both this case and *Ayeni* recognize in similar language the same clearly established rule. *Compare Ayeni*, 35 F.3d at 686 (holding invitation to media unconstitutional because "law enforcement officers' invasion of the privacy of a home must be grounded on either the express terms of a warrant or the implied authority to take reasonable law enforcement actions related to the execution of the warrant") *with* App. 10a (sustaining invitation to media as not clearly unconstitutional despite recognition that

> if officers permit[ ] third parties who [are] not expressly authorized by the warrant and who [are] not assisting reasonable law enforcement efforts related to the execution of the warrant to accompany them into a residence

they have violated the resident's Fourth Amendment rights). Rather than grant immunity for want of a case similar at a high level of factual specificity, *Ayeni* asked whether a reasonable officer would have understood that the press was unauthorized by the warrant. The answer was yes because it was clear that there was no express authorization, and implied authorization could not reasonably have been believed to exist because it was obvious that the press were not assisting in carrying out a purpose related to the execution of the warrant. 35 F.3d at 686. The Ninth Circuit's approach mirrors that of *Ayeni* and likewise resulted in a finding that clearly established law prohibited such conduct.

What happened here was so obviously unconstitutional that no reasonable officer could have thought otherwise. The very reason for the warrant clause was to put an end to general warrants that had allowed government officials to rummage



through citizens' homes for no legitimate purpose. The news reporters here were "snooping around, looking around" for information and photographic images not mentioned in any warrant and not related to any law enforcement purpose. App. 38a-39a. Since all of the respondents understood this, they cannot seriously claim that a reasonable officer in their shoes would not have known that his actions violated a clearly established right.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD K. WILLARD
*Counsel of Record*
DAVID H. COBURN
JAMES S. FELT
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 429-3000

RICHARD SELIGMAN
601 Indiana Avenue, Suite 910
Washington, DC 20004
(202) 745-7800

*Attorneys for Petitioners*

*Of Counsel:*

ARTHUR B. SPITZER
AMERICAN CIVIL LIBERTIES
UNION of the National
Capital Area
1400 20th Street, N.W.
Washington, DC 20036
(202) 457-0800

# APPENDIX

**APPENDIX A — IN BANC DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED APRIL 8, 1998**

**PUBLISHED**

**UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

No. 96-1185

CHARLES H. WILSON; GERALDINE E. WILSON; RAQUEL WILSON, next friend/mother of Valencia Snowden, a minor,

*Plaintiffs-Appellees,*

v.

HARRY LAYNE, Deputy, United States Marshal, Supervisor for the Washington Area, Operation Gunsmoke; JOSEPH L. PERKINS; JAMES A. OLIVO,

*Defendants-Appellants,*

and

RAYMOND M. KIGHT, Sheriff, Montgomery County, Maryland; JOHN DOE, Unknown Sheriff's Deputies; JOHN DOE, Unknown U.S. Marshals; UNITED STATES OF AMERICA; ERIC E. RUNION; MARK A. COLLINS; BRIAN E. ROYNESTAD,

*Defendants.*

*Appendix A*

No. 96-1188

CHARLES H. WILSON; GERALDINE E. WILSON; RAQUEL WILSON, next friend/mother of Valencia Snowden, a minor,

*Plaintiffs-Appellees,*

v.

MARK A. COLLINS; ERIC E. RUNION; BRIAN E. ROYNESTAD,

*Defendants-Appellants,*

and

RAYMOND M. KIGHT, Sheriff, Montgomery County, Maryland; JOHN DOE, Unknown Sheriff's Deputies; HARRY LAYNE, Deputy, United States Marshal, Supervisor for the Washington Area, Operation Gunsmoke; JOHN DOE, Unknown U.S. Marshals; UNITED STATES OF AMERICA; JOSEPH L. PERKINS; JAMES A. OLIVO,

*Defendants.*

Appeals from the United States District Court
for the District of Maryland, at Greenbelt.
Peter J. Messitte, District Judge.
(CA-94-1718-PJM)

Argued: March 3, 1998

Decided: April 8, 1998



*Appendix A*

Before WILKINSON, Chief Judge, and WIDENER, MURNAGHAN, ERVIN, WILKINS, NIEMEYER, HAMILTON, LUTTIG, WILLIAMS, MICHAEL, and MOTZ, Circuit Judges.

* * *

**OPINION**

WILKINS, Circuit Judge:

Charles H. Wilson and Geraldine E. Wilson (the Wilsons)[1] brought this action against federal and state law enforcement officers and others not pertinent to this appeal. The Wilsons allege that their Fourth and Fourteenth Amendment rights were violated when officers entered their home and sought to execute an arrest warrant for their son. *See* 42 U.S.C.A. § 1983 (West 1994); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395-97 (1971). The district court granted summary judgment in part in favor of the officers, but refused to do so on the Wilsons' claim that the officers violated the Fourth Amendment by permitting two newspaper reporters to accompany them into the Wilsons' home and photograph the officers' attempt to execute the arrest warrant. The officers appeal from the decision of the district court denying them qualified immunity with respect to this claim. We reverse.[2]

1. Raquel Wilson joined the Wilsons as a plaintiff in this action on behalf of her daughter Valencia Snowden, the Wilson's grandchild who was present during a portion of the actions that form the basis of this lawsuit. For ease of reference, however, we refer only to the Wilsons as prosecuting this litigation.

2. A panel of this court earlier issued a decision reversing the district court. *See Wilson v. Layne*, 110 F.3d 1071 (4th Cir. 1997). A majority of the judges in active service subsequently voted to consider this appeal en banc. After this hearing, a majority of the judges in active service voted to rehear this appeal en banc.

*Appendix A*

I.

The material facts are not disputed. On April 14, 1992, federal and state law enforcement agents were engaged in a joint effort to apprehend fugitives with a history of armed, violent, criminal conduct. A team composed of Joseph L. Perkins and James A. Olivo of the United States Marshals Service and Mark A. Collins, Brian E. Roynestad, and Eric E. Runion of the Montgomery County, Maryland Sheriff's Department was formed to execute an outstanding arrest warrant. The warrant stated:

> THE STATE OF MARYLAND, TO ANY DULY AUTHORIZED PEACE OFFICER, GREETINGS: YOU ARE HEREBY COMMANDED TO TAKE DOMINIC JEROME WILSON IF HE/SHE BE FOUND IN YOUR BAILIWICK
>
> . . . .

J.A. 124. In addition, two newspaper reporters, one outfitted with a stillshot camera, were to accompany the officers to observe and chronicle the execution of the warrant.[3] The reporters' participation was part of a two-week, news-gathering activity by the newspaper.

During the early morning hours, the officers proceeded to the address listed in police reports, as well as probation and court records, as the fugitive's home. Upon entering the residence, the officers encountered a man dressed only in undergarments who was very angry because of the intrusion. The confrontation between the man and the officers ultimately resulted in the officers

3. At the time, the United States Marshals Service had adopted a written policy permitting members of the news media to "ride along" with its law enforcement officers in order to observe and record operational missions.



*Appendix A*

subduing the man on the floor. In the meantime, a woman dressed in a sheer nightgown emerged from the back of the house. These two individuals were later identified as the Wilsons. The subject of the warrant, the Wilsons' son, was not present. Throughout these events, the reporters observed and photographed what transpired.[4]

The Wilsons subsequently brought this action against the federal and state officers who comprised the arrest team that entered their home; the team's supervisor, Harry Layne; and others not pertinent to this appeal. The Wilsons asserted that their constitutional rights under the Fourth and Fourteenth Amendments were violated by the officers' actions in three ways: (1) the officers used excessive force in attempting to execute the arrest warrant; (2) the officers lacked probable cause to believe that the fugitive would be found at the Wilsons' home; and (3) the officers permitted representatives of the media to enter the Wilsons' home to observe and photograph the execution of the arrest warrant. Ruling on the officers' motion for summary judgment, the district court dismissed the allegations of excessive force and lack of probable cause, concluding that the evidence viewed in the light most favorable to the Wilsons demonstrated that the amount of force the officers employed was reasonable and that the officers possessed probable cause to believe that the fugitive they sought would be found at the Wilsons' home. However, the district court rejected the officers' assertions that allowing the reporters to enter the Wilsons' home without their consent did not violate their constitutional rights. Furthermore, the district court refused to accept the officers' alternative argument that, at a minimum, they were entitled to qualified immunity because in April 1992, the law was not clearly established that permitting members of the media to accompany law enforcement officers into a private

4. These photographs have never been published.

residence during the execution of an arrest warrant was unconstitutional. The officers appeal this latter ruling.[5]

II.

A.

Government officials performing discretionary functions are entitled to qualified immunity from liability for civil damages to the extent that "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *E.g.*, *Harlow v. Fitzgerald* , 457 U.S. 800, 818 (1982); *Winfield v. Bass*, 106 F.3d 525, 530 (4th Cir. 1997) (en banc). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs* , 475 U.S. 335, 341 (1986). It protects law enforcement officers from "bad guesses in gray areas" and ensures that they are liable only "for transgressing bright lines." *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992). Thus, although the exact conduct at issue need not have been held to be unlawful in order for the law governing an officer's actions to be clearly established, the existing authority must be such that the unlawfulness of the conduct is manifest. *See Anderson v.*

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5. The district court denied the Wilsons' request to certify for immediate appeal its rulings with respect to the allegations of excessive force and lack of probable cause to permit those issues to be considered in conjunction with the appeal of the question of the officers' entitlement to qualified immunity. As a result, the only issue pending before us is the qualified immunity inquiry. And, because the facts are undisputed, this question presents a purely legal inquiry into whether the law was clearly established when the underlying events occurred. Thus, we may properly consider this appeal. *See Johnson v. Jones*, 515 U.S. 304, 313 (1995); *Winfield v. Bass*, 106 F.3d 525, 528-30 (4th Cir. 1997) (en banc).



*Creighton*, 483 U.S. 635, 640 (1987); *Pritchett v. Alford*, 973 F.2d 307, 314 (4th Cir. 1992) (explaining that "[t]he fact that an exact right allegedly violated has not earlier been specifically recognized by any court does not prevent a determination that it was nevertheless 'clearly established' for qualified immunity purposes" and that " '[c]learly established' in this context includes not only already specifically adjudicated rights, but those manifestly included within more general applications of the core constitutional principle invoked"). The law is clearly established such that an officer's conduct transgresses a bright line when the law has "been authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the state." *Wallace v. King*, 626 F.2d 1157, 1161 (4th Cir. 1980); *see Cullinan v. Abramson*, 128 F.3d 301, 311 (6th Cir. 1997) (explaining that "[o]rdinarily, at least, in determining whether a right is 'clearly established' this court will not look beyond Supreme Court and Sixth Circuit precedent"), *petition for cert. filed* , 66 U.S.L.W. __ (U.S. Feb. 19, 1998) (No. 97-1342); *Jenkins ex rel. Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821, 826 n.4 (11th Cir. 1997) (en banc) (explaining that "the law can be 'clearly established' for qualified immunity purposes only by decisions of the U.S. Supreme Court, [the] Eleventh Circuit Court of Appeals, or the highest court of the state where the case arose"), *cert. denied*, 118 S. Ct. 412 (1997).

In analyzing an appeal from the rejection of a qualified immunity defense, our first task is to identify the specific right that the plaintiff asserts was infringed by the challenged conduct. *See Taylor v. Waters*, 81 F.3d 429, 433 (4th Cir. 1996). The court then must consider whether, at the time of the claimed violation, that right was clearly established and " 'whether a reasonable person in the official's position would have known that his conduct would violate that right.' " *Id.* (quoting *Gordon v. Kidd*, 971 F.2d

1087, 1093 (4th Cir. 1992)). Our review of the denial of summary judgment based on qualified immunity is de novo. *See Pritchett*, 973 F.2d at 313.

B.

The constitutional right that the Wilsons claim the officers violated, defined at the appropriate level of specificity, is their Fourth Amendment right to avoid unreasonable searches or seizures resulting from the officers' decision to permit members of the media who were not authorized to execute the warrant to enter into a private residence, without the homeowners' consent, to observe and photograph the execution of an arrest warrant. The question before us, then, is whether in April 1992 this right was clearly established and whether a reasonable officer would have understood that the conduct at issue violated it.

The Fourth Amendment provides in pertinent part, "The right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. By 1992, the Supreme Court had ruled that an entry into a home without a warrant is per se unreasonable unless an exception to the warrant requirement, such as exigent circumstances, exists. *See Payton v. New York*, 445 U.S. 573, 588-90 (1980); *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971). And, it is equally well settled that an officer executing a warrant is limited to those actions expressly authorized by the warrant, *see Bivens*, 403 U.S. at 394 n.7, or implicitly authorized because they are reasonable to advance a legitimate law enforcement purpose relating to the warrant or to ensure the officer's or the public's safety, *see Michigan v. Summers* , 452 U.S. 692, 705 (1981). *See also Lawmaster v. Ward*, 125 F.3d 1341, 1349 (10th Cir. 1997) (explaining that "because the



touchstone of the constitutionality of an officer's conduct during a search is reasonableness, when executing a search warrant, an officer is limited to conduct that is reasonably necessary to effectuate the warrant's purpose").

Here, the officers entered the Wilsons' home pursuant to a valid arrest warrant. The officers did not exceed the scope of the warrant by permitting the reporters who accompanied them into the Wilsons' home to engage in activities that the officers could not themselves have undertaken consistent with the warrant. Specifically, the reporters did not conduct a search of, or intrude into, any areas of the Wilsons' home into which the officers would not have been permitted to go in executing the arrest warrant. Further, the reporters' photographs of the events did not amount to a seizure. The Supreme Court has indicated that a seizure occurs only when there has been a "meaningful interference with an individual's possessory interests in . . . property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *see also Arizona v. Hicks*, 480 U.S. 321, 324 (1987) (recording the serial numbers on equipment "did not meaningfully interfere with respondent's possessory interest in either the serial numbers or the equipment, and therefore did not amount to a seizure" (internal quotation marks omitted)). *But see Ayeni v. Mottola*, 35 F.3d 680, 688 (2d Cir. 1994). An application of this definition indicates that the photographic images captured by the reporters were not seized within the meaning of the Fourth Amendment. But, just as importantly for our purposes, it certainly was not clearly established that photographing an arrest constituted a seizure of the images recorded. Thus, reasonable officers under these circumstances had no clearly established law from the Supreme Court, this court, or the Court of Appeals of Maryland from which they necessarily understood that they exceeded the scope of an arrest warrant by permitting reporters to engage in activities

in which they themselves could have engaged consistent with the warrant.

Furthermore, even if we were to agree with the Wilsons that in 1992 it was clearly established that the Fourth Amendment was violated if officers permitted third parties who were not expressly authorized by the warrant and who were not assisting reasonable law enforcement efforts related to the execution of the warrant to accompany them into a residence, we could not conclude that it was clearly established that the conduct in which these officers engaged manifestly fell within the ambit of that rule. When this incident took place in 1992, there was no clear law from the Supreme Court, this court, or the Court of Appeals of Maryland establishing that permitting reporters to observe and photograph the events surrounding the execution of an arrest warrant may not serve a legitimate law enforcement purpose related to execution of the warrant. And, reasonable law enforcement officers might conclude that permitting media representatives to observe and photographically record the execution of an arrest warrant does serve such a purpose. For example, the purpose may be served by affording protection to the officers by reducing the possibility that the target of a warrant will resist arrest in the face of recorded evidence of his actions. Additionally, it could be asserted that facilitating accurate reporting that improves public oversight of law-enforcement activities is a legitimate law enforcement purpose because it deters crime, as well as improper conduct by law enforcement officers. In any event, we conclude that reasonable law enforcement officers could have believed that permitting the reporters to observe and photograph the execution of the arrest warrant advanced a legitimate law enforcement purpose related to the execution of the warrant.

The dissent acknowledges that neither the Supreme Court nor this court had in 1992 addressed whether law enforcement



officers violate the Fourth Amendment by permitting media representatives to accompany them into a private residence to observe and photograph the officers' execution of an arrest warrant. The dissent nevertheless contends that our conclusion that the officers are entitled to qualified immunity is erroneous, asserting that it was clearly established that the Fourth Amendment prohibited government agents from bringing a private citizen into a home to conduct an independent search or seizure. In support of its argument, the dissent points to the decision of this court in *Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995),[6] and to those of three other courts of appeals holding on facts similar to those

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6. In *Buonocore*, an opinion decided long after the events at issue here, officers allowed a security guard to enter a private residence and conduct an independent search for property not authorized by a warrant. *Buonocore*, 65 F.3d at 350-51. In the appeal from the denial of summary judgment to the officers, we characterized the issue presented as whether it was clearly established on November 24, 1992 that "Fourth Amendment law prohibited government agents from bringing a private citizen into Buonocore's home to conduct an independent, general search for items not identified in any warrant." *Id.* at 353 (internal quotation marks omitted). And, we held that it was, reasoning:

> [W]e have no doubt that the Fourth Amendment prohibits government agents from allowing a search warrant to be used to facilitate a private individual's independent search of another's home for items unrelated to those specified in the warrant. Such a search is not reasonable. It obviously exceeds the scope of the required specific warrant and furthermore violates the sanctity of private dwellings.

*Id.* at 356 (internal quotation marks omitted). *Buonocore*, therefore, addressed the question of whether a third party, who is not authorized by the warrant to conduct a search, may accompany law enforcement officers in executing a warrant and undertake an independent search for items not described in the warrant. Of course, the officers here permitted no such general independent search by the reporters.

at issue here that officers were not entitled to qualified immunity, *see Berger v. Hanlon*, 129 F.3d 505 (9th Cir. 1997);[7] *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994);[8] *Bills v. Aseltine*, 958 F.2d 697 (6th Cir. 1992).[9]

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7. In *Berger*, decided more than five years after the events at issue here, the Court of Appeals for the Ninth Circuit ruled that officers who permitted media representatives to accompany them in executing a search warrant for a private purpose not related to law enforcement efforts in 1993 were not entitled to qualified immunity. *See Berger*, 129 F.3d at 510-12.

8. In *Ayeni*, decided in 1994, the Court of Appeals for the Second Circuit held that it was clearly established in March 1992 that officers violated the Fourth Amendment when they permitted a television crew to enter a private residence and film the execution of a search warrant that provided no authorization for their presence. *See Ayeni*, 35 F.3d at 684-86. The court reasoned that although there were no decisions expressly holding that searching agents violate the Constitution by bringing members of the press into a home to observe and report on their activities, it had

> long been established that the objectives of the Fourth Amendment are to preserve the right of privacy to the maximum extent consistent with reasonable exercise of law enforcement duties and that, in the normal situations where warrants are required, law enforcement officers' invasion of the privacy of a home must be grounded on either the express terms of a warrant or the implied authority to take reasonable law enforcement actions related to the execution of the warrant.

*Id.* at 686. Furthermore, the court held that an objectively reasonable officer could not have failed to appreciate "that inviting a television crew — or any third party not providing assistance to law enforcement — to participate in a search was [not] in accordance with Fourth Amendment requirements." *Id.*

9. In *Bills*, which was decided approximately one month prior to the incident under review, the court held that law enforcement officers may violate
(Cont'd)



The decisions on which the dissent relies, however, do not persuade us that the officers are not entitled to qualified immunity. Reliance on decisions issued after the events underlying this litigation, whether the decisions were decided by this court or others, is inappropriate. *See Mitchell v. Forsyth*, 472 U.S. 511, 533-35 (1985). Certainly law enforcement officers need not correctly anticipate future constitutional rulings on pain of personal liability. Further, as noted above, reliance on decisions from other circuits to determine that a given proposition of law is clearly

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(Cont'd)
the Fourth Amendment by permitting a security guard to accompany them into a private residence to execute a search warrant and to engage in an independent search for items that were not described in the warrant. *See Bills*, 958 F.2d at 702-05. The court explained:

> [W]here an intrusion is justified, whether by warrant or by probable cause and exigent circumstances, police are temporarily placed in control of the premises and its occupants. It is as though the premises were given to the officers in trust for such time as may be required to execute their search in safety and then depart. Officers in unquestioned command of a dwelling may violate that trust and exceed the scope of the authority implicitly granted them by their warrant when they permit unauthorized invasions of privacy by third parties who have no connection to the search warrant or the officers' purposes for being on the premises. The warrant in this case implicitly authorized the police officers to control and secure the premises during their search. . . . It did not implicitly authorize them to invite a private security officer to tour plaintiff's home for the purpose of finding [evidence not specified in the search warrant]. . . .

*Id.* at 704-05 (internal quotation marks omitted). Based on this reasoning, the Court of Appeals for the Sixth Circuit held that the officers' conduct presented a jury question concerning whether the officers had exceeded the scope of the search warrant and remanded for further proceedings. *See id.* at 705.

established is inappropriate as a general matter, and we find no basis to depart from the general rule in this instance. Thus, the decisions of the other circuit courts of appeals cannot support a conclusion that the law was clearly established in our circuit. And finally, subsequent to the events giving rise to this litigation, at least one other court of appeals has held on similar facts that law enforcement officers *were* entitled to qualified immunity. *See Parker v. Boyer*, 93 F.3d 445, 447 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997). Relying on the dearth of authority holding the conduct in question to be violative of the Fourth Amendment, the existence of decisions holding that these types of actions by law enforcement officers did not transgress constitutional principles,[10] and the lack of Supreme Court direction on the question, the *Parker* court held that officers were entitled to qualified immunity. *See id.* Given that reasonable jurists can differ on this question, we cannot say that the law was so clear that a reasonable officer must have known his actions transgressed constitutional bounds.

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10. Early cases considering the constitutionality of law enforcement officers allowing members of the media to enter a private residence to observe or record the execution of a warrant are scarce. The few decisions that we have located on this issue are uniform in concluding that such conduct does not violate constitutional principles. *See Moncrief v. Hanton*, 10 Media L. Rep. (BNA) 1620, 1621-22 (N.D. Ohio Jan. 6, 1984) (rejecting argument that police violated the Fourth Amendment by permitting media to enter home and film arrest on the basis that no protected privacy interest was violated); *Higbee v. Times-Advocate*, 5 Media L. Rep. (BNA) 2372, 2372-73 (S.D. Cal. Jan. 9, 1980) (declining to accept plaintiff's assertion that officers violated his constitutional rights by inviting the press to be present during the execution of a search warrant at his residence); *Prahl v. Brosamle*, 295 N.W.2d 768, 774 (Wis. Ct. App. 1980) (rejecting claim that officers infringed the Fourth Amendment by allowing a television reporter to enter plaintiff's property and film search, reasoning "that the filming and television broadcast of a reasonable search and seizure, without more, [do not] result in unreasonableness").



In asserting that no reasonable officer could have believed that the reporters were serving a legitimate law enforcement purpose, the dissent misunderstands the distinction between the reporters' aid in the actual execution of the warrant and other legitimate law enforcement purposes that the reporters may have facilitated by accompanying the officers to observe and record the attempt to execute the warrant. The dissent equates these two distinct concepts, assuming that unless, as a matter of historical fact, the officers intended for the reporters actually to assist in the execution of the arrest warrant, reasonable officers must have known "full well that the reporters served no legitimate law enforcement purpose." Dissent at 27. In support of its argument that the officers did not intend for the reporters to aid in the actual execution of the warrant, the dissent quotes a portion of the statement of the facts in the panel opinion, which observed that the reporters accompanied the officers as part of a two-week news gathering operation that was not designed to serve a law enforcement purpose. The dissent also relies on a portion of the officers' brief in which they acknowledge that the reporters "were not involved in executing the warrant" but instead were "mere bystanders." *Id.* at 27 (internal quotation marks omitted).

While it is undoubtedly true that neither the reporters nor the officers envisioned that the reporters would provide assistance to the officers in actually executing the arrest warrant, it is equally true that reasonable officers may have perceived that permitting the reporters to accompany them served a legitimate law enforcement function. Indeed, the media ride-along policy pursuant to which the reporters accompanied the officers indicated that keeping the public informed of the activities of the Marshals Service was a duty of that agency and that media ride alongs advanced that interest. Further, reasonable officers may have believed that the obvious increase to their safety afforded

by the presence of the reporters constituted a legitimate law enforcement purpose.[11] Moreover, the dissent overlooks that although the officers have readily acknowledged that there was no intent that the reporters aid in the execution of the warrant, the officers consistently have maintained that it was reasonable to believe that the reporters' presence served a legitimate law enforcement purpose:

> [I]t is in fact a legitimate function of law enforcement to facilitate accurate reporting on law-enforcement activities and to improve public oversight of those activities by use of the press. These efforts are important because *both* the deterrence of crime *and* the deterrence of improper conduct by law-enforcement officers are vital to the broader mission. The formal policy of the United States Marshals Service . . . was directed to these ends.

Reply Brief of Appellants at 6-7 (footnote omitted).

Because the dissent fails to understand the distinction between an intent that the reporters assist in the actual execution of the warrant and a reasonable belief that permitting the reporters to accompany the officers served a legitimate law enforcement purpose, the dissent incorrectly concludes that no reasonable law enforcement officer who knew the former could believe the latter. Rather, in our view, a reasonable law enforcement officer apprised of the fact that the officers did not intend for the reporters to assist in actually executing the warrant nevertheless reasonably

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11. Of course, we do not hold that these purposes actually justified the reporters' presence while the warrant was executed; we merely hold that in the absence of clearly established law holding that they were not adequate to warrant their presence, reasonable officers may have believed them to be.



could have concluded that permitting the reporters to accompany them while executing the warrant served a legitimate law enforcement purpose.

III.

We stress that we do not address whether the officers' conduct was constitutional or appropriate, only whether the legal landscape when these events occurred was sufficiently developed that it would have been obvious to reasonable officers that the actions at issue were violative of the Fourth Amendment. Because in April 1992 it was not clearly established that permitting media representatives to accompany law enforcement officers into a private residence to observe and photograph their attempt to execute an arrest warrant would violate the homeowner's constitutional rights, we hold that these officers are entitled to qualified immunity. Consequently, we reverse the decision of the district court refusing to grant summary judgment in favor of the officers.

*REVERSED*

WIDENER, Circuit Judge, concurring:

I concur in the result obtained by the majority.

I also concur in all of the majority opinion except the four sentences commencing with "and" on page 9, line 15, and ending with "warrant" on page 9, line 29. The conclusion there mentioned is not a question before us, and I would not express an advisory opinion upon it.

*Appendix A*

MURNAGHAN, Circuit Judge, dissenting:

News media (principally newspapers, journals, magazines, television and radio) have an abiding interest in collecting information and observing events connected with such information whenever they occur. The media most naturally find criminal activities and steps to punish the perpetrators fascinating to their readers, viewers and listeners. What goes on in court or what brings matters to court are high on the media's list of matters of interest. Understandably media devote much attention to the arrest of those accused of crime and a photograph of one being so arrested would be much desired by the media.

Not surprisingly, riding along with the police is regarded as a most valuable method of securing photographs and interviews with those sought by the police. Riding along causes few legal problems when done on the street or in other public places. However, some of the most interesting arrests occur in private locations, especially private homes. An intrusion into a home necessitates, in virtually every case, a warrant from a judicial officer, except where one of a few specifically established and well-delineated exceptions applies. When requested, such a warrant in virtually every case is issued to the police.

On April 14, 1992, Judge Ruben of Maryland's Sixth Judicial Circuit issued three warrants for the arrest of Dominic Jerome Wilson. The warrants were addressed "to any duly authorized peace officer." The warrants made no mention of where the arrest was to take place nor of joining a news reporter or a photographer to the team executing the warrant nor of the need for such person's assistance in the police execution of the warrant. Nevertheless, the team of Deputy U.S. Marshals and Montgomery County police officers (hereinafter "the police" or "the officers") invited a



*Appendix A*

newspaper reporter and photographer seeking a story to accompany the police during the execution of the warrant. The police allowed the reporters to enter the private home of Dominic Jerome Wilson's parents without their permission, to observe the execution of the warrants issued to the police, and to photograph the Wilsons in a state of undress and under humiliating circumstances.

It has long been established that a police officer executing a warrant is limited to those actions "strictly within the bounds set by the warrant," *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 394 n.7 (1971), or reasonably necessary for its execution, *see Michigan v. Summers*, 452 U.S. 692, 705 (1981). The police officers violated these clearly established Fourth Amendment principles when they invited newspaper reporters to enter a private home and photograph the residents for purely commercial newspaper purposes during the execution of an arrest warrant. The reporters were not there to involve themselves in such execution. The ride-along policy of the Department of Justice by which it was attempted to justify their presence stated that the reporters riding along were there to see and record what actually happens. Nevertheless, the *en banc* majority grants the officers immunity for their actions in permitting the reporters' invasion of the privacy of the home to which the Wilsons were entitled. The majority presents post-hoc rationalizations to support its assertion that the defendants could have believed that inviting the reporters into the home was reasonably necessary to serve the purposes of the arrest warrants. Such a ruling seeks to convert qualified immunity to absolute immunity.[1]

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1. The majority has not argued that an exception to the warrant requirement justified the search. *See Mincey v. Arizona*, 437 U.S. 385, 390 (1978) ("The (Cont'd)

*Appendix A*

No reporters' presence was mentioned in the warrants, and there were no exigent circumstances justifying warrantless action. Because no reasonable police officer could have believed that inviting the reporters into the home or allowing the photographer to take pictures either was authorized by the warrant or was reasonably necessary to accomplish its legitimate law enforcement purposes, the police officers' actions amounted to unreasonable searches and seizures in violation of clearly established Fourth Amendment law. I vigorously dissent.

I.

At 6:45 on the morning of April 14, 1992, a team of deputy U.S. Marshals and Montgomery County Police Officers entered the home of Charles and Geraldine Wilson. The officers were there to execute arrest warrants for Dominic Wilson, the Wilsons' adult son. It is to be emphasized that the police and deputy Marshals had no further powers conferred on them by the arrest warrants and no mention was made in the warrants of media presence.

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(Cont'd)
Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions.' " (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)); *Wallace v. King*, 626 F.2d 1157, 1161 (4th Cir. 1980) (explaining that, to justify a warrantless search for the subject of an arrest warrant in the home of a third party, "not only must the officers have probable cause to believe the person named in the arrest warrant is on the premises of the third person, but there must also exist an appropriate exception to the warrant requirement," such as "exigent circumstances"). Clearly no such exception was "specifically established and well delineated."



*Appendix A*

Pursuant to the U.S. Marshals' Ride-Along policy, they had invited a reporter and a photographer from the *Washington Post* to accompany them on their mission.[2] The policy explained that "ride-alongs, as the name implies, are simply opportunities for reporters and camera crews to go along with Deputies on operational missions so they can see, and record, what actually happens." The police officers concede that the reporters "were not involved in executing the warrant," Brief of Appellants at 8, 12, but were "mere bystanders," *id.* at 8.[3] Although the policy instructed the Marshals to "establish ground rules" with the reporters, including "what can be covered with cameras and when, [and] any privacy restrictions that may be encountered," the officers exercised no control over the reporters or what they photographed, even once inside the Wilsons' private home.

The Wilsons were lying in bed that morning when they heard a commotion. Mr. Wilson, dressed only in his undershorts, got up to investigate and found a team of armed plainclothes officers, accompanied by the reporters, in his living room. The officers subdued Mr. Wilson, who was angry because of the intrusion. When Mrs. Wilson came out of the bedroom, wearing only a sheer nightgown, she saw a police officer holding a gun to her husband's head, pinning him face down on the floor in his

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2. There was no equivalent Montgomery County Sheriff's Department ride-along policy. In fact, Raymond M. Kight, Sheriff of Montgomery County, believed that it would be a violation of the constitutional rights of a homeowner to bring a civilian on a ride-along program into a private home, unless the civilian were there as a witness to identify someone or served some other legitimate purpose related to the execution of the warrant.

3. Even if photographs had been reasonably necessary to accomplish the purpose of the warrant, allowing a member of the news media to take the photographs was not; the police could have brought along a camera and snapped a picture themselves.

undershorts. The news team observed and took photographs throughout these events.

The Wilsons filed suit against the Montgomery County police officers, the Deputy U.S. Marshals, their supervisor and others. They alleged that their Fourth Amendment rights were violated by the officers' inviting the reporter and photographer to accompany them into the Wilsons' home and to observe and photograph during the attempt to execute the arrest warrant. The defendants' assertion of qualified immunity was rejected by the district court, then brought to us on interlocutory appeal. A divided panel of this court reversed the district court, holding that the officers were entitled to qualified immunity.

This rehearing *en banc* followed.

II.

A.

We must not, when arguing whether some specific incarnation of Fourth Amendment rights was or was not clearly established, lose sight of the core values that the Fourth Amendment was designed to protect. That amendment is "an American extension of the English tradition that a man's house [is] his castle." William Cuddihy & B. Carmon Hardy, *A Man's House Was Not His Castle: Origins of the Fourth Amendment to the United States Constitution* , 37 Wm. & Mary Q. 371, 400 (1980). "The belief that 'a man's house is his castle' found expression at least as early as the sixteenth century" in English jurisprudence. *Id.* at 371.



In *Semayne's Case*, 77 Eng. Rep. 194 (K.B. 1604), the King's Bench resolved that "the house of every one is to him as his castle and fortress," *id.* at 195, and prohibited the government from forcibly entering a home at the behest of a private party, *id.* at 198. Although *Semayne's Case* accepted broad powers of search in cases where the government was a party, Lord Coke (who witnessed *Semayne's Case* as attorney general) later applied its adage that a man's house was his castle to curtail the arbitrary government invasion of private homes. *See* Cuddihy & Hardy, *supra*, at 376. William Pitt elaborated upon the sanctity of the home in his impassioned defense of private homeowners against discretionary government searches before Parliament in 1766. *See id.* at 386.

> The poorest man may, in his cottage, bid defiance to all the forces of the crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the king of England may not enter; all his force dares not cross the threshold of the ruined tenement.

*Id.* And William Blackstone, in his *Commentaries* wrote:

> And the law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity. . . . For this reason no doors can in general be broken open to execute any civil process; though, in criminal cases, the public safety supersedes the private.

William Blackstone, 4 *Commentaries on the Laws of England* 223 (1769).

These principles are embodied in the Fourth Amendment of the United States Constitution: "The right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures, shall not be violated. . . ." As Justice Stewart wrote for the Supreme Court in *Silverman v. United States*, 365 U.S. 505 (1961):

> The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion. *Entick* v. *Carrington*, 19 *Howell's State Trials* 1029, 1066; *Boyd* v. *United States*, 116 U.S. 616, 626-30 . . . . William Pitt's eloquent description of this right has been often quoted. The late Judge Jerome Frank made the point in more contemporary language: "A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty — worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle." *United States* v. *On Lee*, 193 F.2d 306, 315-16 (dissenting opinion).

*Id.* at 511 & n.4. Today's majority opinion undermines the right at the very core of the Fourth Amendment and sanctions an "unreasonable governmental intrusion."





B.

"[G]overnment officials performing discretionary functions[ ] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). It is critical to define the rights being examined at the appropriate level of specificity. *See DiMeglio v. Haines*, 45 F.3d 790, 803-04 (4th Cir. 1995). If the right is defined too broadly, it will always be found to have been clearly established. For example, it is clearly established that the deprivation of property without due process of law violates the Fourteenth Amendment. On the other hand, if the right is defined too narrowly, no proposition will ever be found to be clearly established. For example, probably no case will have held that the exact acts in question regarding the exact parties in contention under the exact circumstances presented is a constitutional violation.

For the right allegedly violated to be clearly established, it is not necessary that "the very act in question ha[ve] previously been held unlawful"; rather "in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). If the unlawfulness is apparent, the fact that some courts may have reached an incorrect result will not shield a defendant's violation of a clearly established right. *See Jones v. Coonce*, 7 F.3d 1359, 1362 (8th Cir. 1993) (finding that a right was clearly established despite an unpublished district court case that had not recognized the right).

C.

The government's right to intrude upon the privacy of the home is narrowly circumscribed by the Fourth Amendment's

prohibition against unreasonable searches and seizures. The "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States District Court*, 407 U.S. 297, 313 (1972).

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home — a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion." In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

*Payton v. New York*, 445 U.S. 573, 589-90 (1980) (citation omitted) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)) (alterations in original). Similar language is omnipresent in the Supreme Court's Fourth Amendment jurisprudence. *See, e.g.*, *Winston v. Lee*, 470 U.S. 753, 761-62 (1985) (explaining that "[i]ntruding into an individual's living room" to conduct a search "damage[s] the individual's sense of personal privacy and security and [is] thus subject to the Fourth Amendment's dictates").



Unless a search is supported by a warrant or a specific exception to the warrant clause, it is per se unreasonable, and therefore unconstitutional. *See Coolidge v. New Hampshire*, 403 U.S. 443, 489 (1971) ("[S]earches and seizures inside a man's house without warrant are *per se* unreasonable in the absence of some one of a number of well defined 'exigent circumstances.' "). The arrest warrant in this case was addressed "to any duly authorized peace officer." It made no mention of a news team or of a photographer, or of any private individuals to be invited into another's private home. Nor is there any claim that exigent circumstances or some other exception to the warrant clause excused the Montgomery County Circuit Court's failure to allude to a reporter or photographer.

Even when a valid warrant authorizes entry into a private home, a police officer is limited to those actions explicitly named in the warrant. *See Bivens*, 403 U.S. at 394 n.7 ("[T]he Fourth Amendment confines an officer executing a search warrant strictly within the bounds set by the warrant. . . ."); *Buonocore v. Harris*, 65 F.3d 347, 356 (4th Cir. 1995). The reasonableness of a search or seizure depends in part on how it is carried out. *See Graham v. Connor*, 490 U.S. 386, 395 (1989).

A warrant may imply some limited authority to take actions not explicitly mentioned in it, but reasonably necessary to further its purposes. *See Summers*, 452 U.S. at 705 (holding that a search warrant for a home carries the implied authority to detain its occupants); *Lawmaster v. Ward*, 125 F.3d 1341, 1349 (10th Cir. 1997). For example, "an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." *Payton*, 445 U.S. at 603. This authority is implied because "[i]f there is sufficient evidence of a citizen's participation

in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law." *Id.* at 602-03.

Because the media presence here served no legitimate law enforcement function, but rather was intended solely to gather news to profit the *Washington Post*, the arrest warrant did not carry with it the implied authorization to invite the media into a private house.[4] The reporter and photographer "were not involved in executing the warrant," but were "mere bystanders." Brief of Appellants at 8. The district court found that the reporters were "not serving any legitimate law enforcement purposes." (transcript of hearing on summary judgment motions). A warrant does not carry with it the authority to bring along mere bystanders to observe for their own commercial purposes.

Even if we only consider cases from the Supreme Court, the Fourth Circuit Court of Appeals, and the Court of Appeals of Maryland, the principles recounted above were all clearly established by the time of the search in April 1992. In addition, by March of 1992, one circuit court had explained that officers searching a private residence pursuant to a warrant might unconstitutionally "exceed the scope of the authority implicitly granted them by their warrant when they permit unauthorized invasions of privacy by third parties who have no connection to the search warrant or the officers' purposes for being on the premises." *Bills v. Aseltine*, 958 F.2d 697, 704 (6th Cir. 1992). And it has been established in the common law since the early 1600's that "[e]ven a duly authorized officer could not execute a

4. An intrusion into a private home is entirely different from a situation where ride-along reporters accompany police officers or cameras are mounted on police cars on a public street. Those situations do not involve the reasonable expectation of privacy inherent in a home invasion.



warrant to further the purposes of a private individual." *Buonocore*, 65 F.3d at 354 (citing *Semayne's Case*, 77 Eng. Rep. 194, 198 (K.B. 1604); *Burdett v. Abbott*, 104 Eng. Rep. 501, 560-61 (K.B. 1811)).

The Supreme Court jurisprudence, circuit court precedent and long-standing principles of common-law discussed above were not made any less clear by the fact that two unpublished district court opinions had concluded that inviting the news media to observe the execution of a search warrant within a private home did not violate any federally protected right. *See Moncrief v. Hanton*, 10 Media L. Rep. (BNA) 1620, 1621-22 (N.D. Ohio Jan. 6, 1984) (holding that plaintiffs had "alleged no facts to show a search was unreasonable," nor had they stated a claim for violation of any other federally protected right to privacy);[5] *Higbee v. Times-Advocate*, 5 Media L. Rep. (BNA) 2372, 2372-73 (S.D. Cal. Jan. 9, 1980) (rejecting a plaintiff's claim of deprivation of federally protected privacy rights *without addressing the Fourth Amendment*). We have previously observed that "[s]ince unpublished opinions are not even regarded as binding precedent in our circuit, such opinions cannot be considered in deciding whether particular conduct violated clearly established law for purposes of adjudging entitlement to qualified immunity."[6] *Hogan v. Carter*, 85 F.3d 1113, 1118 (4th Cir.), *cert.*

5. Despite *Moncrief*'s holding, the entry by the news media, without mention in the warrant, was plainly unreasonable in Fourth Amendment terms.

6. It seems logical that repeated decisions refusing to recognize a right would be evidence that the right was not clearly established even if the opinions were unpublished. However, it is well known that judges may put considerably less effort into opinions that they do not intend to publish. Because these opinions will not be binding precedent in any court, a judge may be less careful about his legal analysis, especially when dealing with a novel issue of law. For this reason we are loathe to cite to unpublished opinions, *see* Local Rule 36(c), nor will we consider them to be evidence that a right is or is not clearly established.

*denied*, 117 S. Ct. 408 (1996). More importantly, neither of the unpublished district court cases squarely addressed the claim made by the Wilsons, that police violate the Fourth Amendment when they invite reporters who are not mentioned in the warrant nor reasonably necessary to its execution to accompany them into a private home, without the consent of the homeowner. In *Moncrief* the court only addressed procedural challenges to the execution of the warrant (such as its timing) in rejecting the plaintiffs' Fourth Amendment claim. *See Moncrief*, 10 Med. L. Rep. at 1621. And the court in *Higbee* never considered the Fourth Amendment at all. *See Higbee*, 5 Med. L. Rep. at 2372-73. Neither case endorses or approves of the actions here complained of; they never discuss the issue at all. Such unpublished cases amount to no precedent whatsoever, and cannot render a defendant immune from liability for the violation of a clearly established law. *See Jones*, 7 F.3d at 1362 (finding that a right was clearly established, despite an unpublished district court case that had not recognized the right); *compare Ayeni v. Mottola*, 35 F.3d 680, 684-86 (2d Cir. 1994) (holding that it was clearly established in 1992 that officers violated the Fourth Amendment when they allowed a television crew to film the execution of a search warrant (which made no mention of their presence) at a private residence), *cert. denied*, 514 U.S. 1062 (1995), *with Parker v. Boyer*, 93 F.3d 445, 447 (8th Cir. 1995) (observing that no such right was clearly established because most cases that had addressed the question had found no constitutional violation, citing unpublished cases but ignoring broader principles of Fourth Amendment law), *cert. denied*, 117 S. Ct. 1081 (1997).

In addition to the unpublished cases, the majority notes that an intermediate appellate court in Wisconsin has faced a similar issue. That court in 1980 was "unwilling to accept the proposition



that the filming and television broadcast of a reasonable search and seizure, without more, result in unreasonableness," where "neither the search . . . nor the film or its broadcast has been shown to include intimate, offensive or vulgar aspects." *Prahl v. Brosamle*, 295 N.W.2d 768, 774 (Wis. Ct. App. 1980). Unlike that case, here the search and photography clearly involved intimate aspects — Mr. Wilson was held at gunpoint in his underwear and Mrs. Wilson was photographed in only a sheer nightgown. Thus *Prahl* offers no solace to these defendants.[7]

It was manifest to any reasonable officer in 1992 (indeed before that date) that he had to strive to minimize the substantial intrusion upon privacy that accompanies the execution of a warrant in a private home. The Supreme Court has warned that "responsible officials, including judicial officials, must take care to assure that [searches and seizures that may reveal innocuous, private information] are conducted in a manner that minimizes unwarranted intrusions upon privacy." *Andresen v. Maryland*, 427 U.S. 463, 482 n.11 (1976). Here the police officers *maximized* the intrusion upon the privacy of the parents' home during a search for their son, by holding the innocent occupants of the home at gunpoint while members of the media photographed them in their underwear. The officers could hardly have done more

7. Even had *Prahl* been directly supportive of the officers' actions, its erroneous conclusion could not immunize them from liability for violation of clearly established law. Although we have in the past held that a single state court of appeals case to the contrary "alone suffice[d] to show that [a recently recognized right] had not theretofore been clearly established." *Swanson v. Powers*, 937 F.2d 965, 969 (4th Cir. 1991), in that case the newly recognized tax holding did not have the clear constitutional pedigree of the right the Wilsons assert, *see id.* at 968 (holding that the right not to be discriminatorily taxed was not clearly established because "[t]he most pertinent judicial decisions had upheld comparable taxing schemes and the doctrine of intergovernmental tax immunity was, at best, ambiguous").

violence to the well-established Fourth Amendment principles recounted above.

D.

The majority does not disagree with the conclusion that

> in 1992 it was clearly established that the Fourth Amendment was violated if officers permitted third parties who were not expressly authorized by the warrant and who were not assisting reasonable law enforcement efforts related to the execution of the warrant to accompany them into a residence. . . .

Majority opinion at p. 9. The majority nevertheless has asserted that because there was "no clear law . . . establishing that permitting reporters to observe and photograph the events surrounding the execution of an arrest warrant *may not* serve a legitimate law enforcement purpose related to execution of the warrant," a reasonable law enforcement officer might have concluded that permitting the reporters in this case to observe and photograph *did* serve such a purpose. *Id.* at 9 (emphasis added).

The majority's argument is speculative and disingenuous at best; it may just as well have argued that, because there was no law prohibiting reporters or photographers from being authorized by the warrant, a reasonable officer might have concluded that the reporters and photographer in this case *were* authorized by the warrant. But of course, the officers knew that they were not so authorized; the warrant made no mention of reporters or photographers. Likewise, the officers knew full well that the reporters served no legitimate law enforcement purpose, and no



reasonable officer on that team could have thought otherwise. The officers recognized as much when they explained in their brief that the reporters "were not involved in executing the warrant" but were "mere bystanders." Brief of Appellants at 8. The panel opinion, in finding there was qualified immunity, stated that: "[t]he reporters' participation was part of a two-week, news-gathering investigation by the newspaper; it was *not designed* to serve any legitimate law enforcement purpose." 110 F.3d 1071, 1072 (4th Cir. 1997) (emphasis added).[8]

The news gathering team was part of a two week investigation to produce a story or stories about law enforcement. The police brought the team along in the hope of getting some good press; that is all. The majority's suggestion that the police officers might have concluded that the reporters would "afford[ ] protection to the officers by reducing the possibility that the target of a warrant will resist arrest in the face of recorded evidence of his actions," majority opinion at 9, is absurd.[9] The team was not brought along for this reason, and no reasonable member of the team could

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8. Interestingly, the *en banc* majority opinion leaves out the second half of that sentence. *See* majority opinion at 4.

9. Although I have cited to the passage on page 9 as the "majority opinion," it is important to note that only five of the eleven active Circuit Judges have joined this portion of the *en banc* opinion. A majority of the *en banc* court (the five dissenting Judges and Judge Widener) does not endorse the hypothetical reasons referred to as legitimate justifications for the officers' actions. Nor is the conclusion, *see* majority op. at 9 ("In any event, we conclude that reasonable law enforcement officers could have believed that permitting the reporters to observe and photograph the execution of the arrest warrant advanced a legitimate law enforcement purpose related to the execution of the warrant."), the law of our Circuit; on that point, the Circuit is evenly divided.

have believed that it was.[10] There is no evidence that the team served this or any other legitimate law enforcement purpose.

Police officers cannot justify exceeding the clear bounds of a warrant by asserting that their actions *might fortuitously* have served some legitimate purpose despite being *designed* with no such purpose in mind. The reporters might also have helped by carrying the warrant while the officers handcuffed suspects, or by holding the door open for an officer while he was carrying contraband; but to uphold the police actions because of the *potential for fortuitous assistance*, despite clearly not being designed to serve law enforcement, would make a mockery of the rule that an officer's actions are limited to the scope authorized by the warrant. *See Bivens*, 403 U.S. at 394 n.7.[11] The exceptions to this strict limitation permit only those actions reasonably necessary to accomplish the purpose of the warrant. *See Payton*, 445 U.S. at 602-03; *Summers*, 452 U.S. at 705.

It is fundamental that, when practicable, officers must obtain the approval of a neutral judicial officer, via a warrant, for any

10. This attention to the belief that the actual officers may have possessed at the time of the search "does not reintroduce into qualified immunity analysis the inquiry into officials' subjective intent." *Anderson*, 483 U.S. at 641. Rather, the Supreme Court has explained that the determination of whether it was objectively reasonable for an officer to have believed that his search was lawful "will often require examination of the information possessed by the searching officials." *Id.* Our inquiry must ask whether a reasonable officer, knowing what these officers knew about the news team, could have concluded that their presence was reasonably necessary to serve the purpose of the arrest warrant.

11. Similarly, early English jurisprudence recognized that a warrant issued to officers in one jurisdiction cannot properly be executed by officers of another jurisdiction. *See Freegard v. Barnes and Barton*, 155 Eng. Rep. 1185, 1186 (Exch. 1852).



intrusion upon the Fourth Amendment privacy of an individual's home. *See Johnson v. United States*, 333 U.S. 10, 13-14 (1948). If the presence of a photographer or other observer on a search in a private home would be reasonably necessary to serve a legitimate purpose, then a police officer in obtaining the warrant should explain so to the judicial officer issuing the warrant. *See, e.g., Stack v. Killian*, 96 F.3d 159, 163 (6th Cir. 1996) (holding that police officers were justified in bringing a television crew into a house to videotape the execution of a search warrant because "the warrant at issue [specifically] authorized 'videotaping and photographing' during the execution of the search."). Despite these settled principles, the majority's holding today allows police unilaterally to invite a reporter or anyone else to accompany them whenever entering a house, even if the warrant says absolutely nothing about allowing other parties to enter, so long as their presence might fortuitously produce some benefit to the police.[12]

E.

A proper understanding of the relationship between this case and our precedent in *Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995), further reveals that the officers' actions violated clearly

12. The majority's holding will also undermine the rule recognized in *Buonocore*, 65 F.3d 347, discussed below, that "the Fourth Amendment prohibits government agents from allowing a search warrant to be used to facilitate a private individual's independent search of another's home for items unrelated to those specified in the warrant," *id.* at 356. That private individual's presence, after all, might "afford[ ] protection to the officers by reducing the possibility that the target of a warrant will resist arrest in the face of" a witness to his actions. Majority opinion at 9. By the majority's reasoning, such potential fortuitous assistance might be enough to shield an officer from liability for a clear constitutional violation.

established law. In *Buonocore*, officers executing a search warrant for illegal weapons at the plaintiff's residence invited a security officer from the plaintiff's work to attend the search and look for items possibly stolen from work (which were not mentioned in the warrant). *See id.* at 350. The plaintiff filed a *Bivens* action alleging that the officers' actions violated the Fourth Amendment, and the officers raised a qualified immunity defense. *See id.* at 351-52.

The Fourth Circuit in *Buonocore* discussed two related concepts contained within the Fourth Amendment:

> First, by mandating that "no warrants shall issue" unless they "particularly" describe "the place to be searched" and "things to be seized," the Framers prohibited the use of general warrants issuable to anyone. Second, by expressly acknowledging the substantive "right of the people to be secure in their . . . houses," the Framers recognized a person's special right to privacy, to be left undisturbed — except for reasonable searches — within his own home.

*Id.* at 353. After a thorough and detailed analysis, the court concluded that the officers' actions offended both aspects of the Fourth Amendment:

> In view of the "common law at the time of the framing," of the Fourth Amendment, and the Supreme Court's uniform interpretation of the Amendment's protections since that time, we have no doubt that the Fourth Amendment prohibits government agents from allowing a search warrant to be used to facilitate



> a private individual's independent search of another's home for items unrelated to those specified in the warrant. Such a search is not "reasonable." It obviously exceeds the scope of the required specific warrant and furthermore violates the "sanctity of private dwellings."

*Id.* at 356 (citations omitted).

The *Buonocore* panel next asked whether these rights were clearly established at the time of the search (in November of 1992). Instead of analyzing the two elements separately, however, it combined them, holding that "[t]he right to be free from government officials facilitating a private person's general search of the sort Buonocore alleges was conducted here, is 'manifestly included' within 'core' Fourth Amendment protection." *Id.* at 357.[13] On that basis the *en banc* majority attempts to read narrowly and distinguish *Buonocore* from the situation in *Wilson*.

Today's majority recognizes that *Buonocore* holds that "it was clearly established on November 24, 1992 that 'Fourth Amendment law prohibited government agents from bringing a private citizen into Buonocore's home to conduct an independent, general search for items not identified in any warrant.' " Majority opinion at 10 n.6 (quoting *Buonocore*, 65 F.3d at 353). Of course, the reporter and photographer brought into the Wilson home were private citizens. But the majority argues that these reporters did not conduct a "general independent search," *id.*, nor was their taking of photographs a seizure, *id.* at 8-9. Neither assertion is

13. It was not necessary at the time to discuss whether the right to be free from the police inviting third parties, who were not mentioned in the warrant and not reasonably necessary to its execution, into a private home during execution of a warrant, independent of their searching, was clearly established.

persuasive; in fact, the rights asserted by the Wilsons are analogous to those asserted by Buonocore.

First, it is clear that the reporter's and photographer's actions constituted an independent search. The district court found that

> to the extent that [the reporters] weren't [trying to aid law enforcement], they were in the house, snooping around, looking around, participating in one fashion or another with both the search of the premises for the individual, who was not found, and the seizure of the Wilsons, who were detained and actually photographed by the photographer.

(transcript of hearing on summary judgment motions).

An inspection amounts to a "search" if it intrudes upon a subjective expectation of privacy that society is prepared to recognize as reasonable. *See Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). The Wilsons unquestionably had a reasonable expectation of privacy in their home and in their undressed bodies vis-a-vis the reporters. The reporter's and photographer's "snooping around" and "looking around" the inside of the Wilsons' home violated that reasonable expectation of privacy. The violation was magnified exponentially by the reporter's intention to publish the story he observed to the world at large, and the photographer's taking photographs of the Wilsons' humiliating circumstances, particularly Mr. Wilson wearing only his underwear, being held prostrate on the floor with a gun to his head.[14]

14. It is immaterial that the photographs have not yet been published, except to the extent that publishing them should increase the allowable damages. They have in any event been seen by him who took them and by an editor or editors of the *Washington Post*.



Perhaps the majority believes that the Wilson search did not implicate the right recognized in *Buonocore* because "the reporters did not conduct a search of, or intrude into, any areas of the Wilsons' home into which the officers would not have been permitted to go in executing the arrest warrant." Majority opinion at 8. Any attempt to distinguish the *Buonocore* search on the grounds that the *Wilson* search was not "an independent" one, however, is unavailing.[15]

The news team's search of the Wilson home was independent of the police execution of the arrest warrant in that the two parties were looking for altogether different things: the police were looking for a fugitive whereas the news team was looking for anything dramatic that might make a good story. The language in *Buonocore*

15. It is possible that the majority means to suggest that, because the officers had already seen everything that the reporters saw, the Wilsons had no remaining expectation of privacy in their home or undressed persons to be infringed by the reporters' observation. *See* Brief of Appellant at 16-17 (citing *United States v. Jacobsen*, 466 U.S. 109, 115 (1984)). Such a mechanical understanding of a reasonable expectation of privacy may be appropriate in regard to a search that reveals only information —for example, once an individual gives information to a third party, he assumes the risk that the third party will reveal the information to the authorities. *See United States v. Miller*, 425 U.S. 435, 442-43 (1976). An expectation of privacy in the shared information is not reasonable, and does not implicate the Fourth Amendment. *See id.* at 443.

But the same cannot be said for a search that intrudes on a privacy right founded as much in dignity as in secrecy. If the Wilsons had invited a guest into their home, the guest could not then have opened the door to the police to conduct a search. *Illinois v. Rodriguez*, 497 U.S. 177, 181-82 (1990). One retains a reasonable expectation of privacy in one's home, vis-a-vis the government, even if one has previously allowed someone else to enter. Similarly, the Wilsons retained a reasonable expectation of privacy in their home, vis-a-vis the reporters, even though the police had the right to enter pursuant to the warrant. The reporters clearly had no such right.

stressing the independence of the officers' and private party's searches, 65 F.3d at 358-59, served only to explain why 18 U.S.C.A. § 3105 (West 1985) did not offer a defense to the officers. Section 3105 provides that a search warrant may be served by a person not mentioned in the warrant only if the third party acts "in aid of the officer on his requiring it, he being present and acting in its execution." 18 U.S.C.A. § 3105 (West 1985). Daniel Buonocore's Fourth Amendment rights would still have been violated if the private party who searched his house at the invitation of the police officers had followed them around the house, going only where the officers went, as long as the private party was acting independently of the officers, that is, not in their aid.

Nor is the majority correct to assert that the photographing of the Wilsons, undressed, was not a "seizure" because it did not "meaningful[ly] interfer[e] with" their "possessory interests in . . . property." Majority opinion at 8 (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) ) (internal quotation marks omitted). We have in the past recognized that "taking a photograph may, under some circumstances, constitute an unreasonable seizure." *United States v. Espinoza*, 641 F.2d 153, 166-67 (4th Cir. 1981) (finding that where an officer has a right to be in a given location, he may take photographs of what he sees in plain view, thereby " 'seizing' those views themselves as evidence."). The reporters, however, had no right to be within the Wilsons' home, and the Wilsons unquestionably had a possessory interest in their undressed likenesses. Had their photographs been published, they might have sued the *Washington Post* for invasion of privacy. *See Lawrence v. A.S. Abell Company*, 475 A.2D 448, 453 (Md. 1984) (recognizing that a newspaper can be sued for appropriation of another's likeness, but not if the picture is news, taken while in a public place at a newsworthy event). The



photographer did not have the Wilsons' permission to photograph, nor was the Wilsons' home a public place. The property interest was clearly established well before the search in 1992.

The majority concludes its discussion of the reporters' actions by asserting that

> reasonable officers under these circumstances had no clearly established law from the Supreme Court, this court, or the Court of Appeals of Maryland from which they necessarily understood that they exceeded the scope of an arrest warrant by permitting reporters to engage in activities in which they themselves could have engaged consistent with the warrant.

Majority opinion at 8-9. One need only follow that assertion to its logical conclusion to see that it reduces to an absurdity. It implies that if a police officer had a warrant addressed to him by which he could invade someone's privacy, he could reasonably have believed that it was permissible to allow any other party to do whatever was authorized by the warrant. If, for example, the police officers had a warrant to perform a body cavity search upon Mrs. Wilson, the majority implies that they could have believed the warrant authorized them to allow members of the public to watch and then to perform the body cavity search themselves. Furthermore, assuming that a photograph is not a seizure, a police officer conducting a strip search pursuant to a warrant could believe the warrant authorized him to invite newspaper photographers to photograph Mrs. Wilson being stripped.

Of course this is ridiculous. Such a search would be patently unreasonable. But it would be one in which the reporter had seen

no more than the officer was entitled to see, and in which the photographer, for his own private benefit, took pictures no more intrusive than the police *could* have taken if they *had* had a legitimate reason to do so. In today's case the majority finds that it was not clearly unreasonable for a police officer to force at gunpoint a citizen in his underwear to pose for a camera, potentially to be exhibited to the entire viewing readership of the *Washington Post*. This, too, was patently unreasonable.

In sum, the reporters' observations and photography constituted an additional private search and seizure not described in the warrant nor carrying out its purposes. The officers' inviting the reporters into the home to conduct their search for news while the officers executed the arrest warrant thus falls squarely under *Buonocore*, and was clearly prohibited by the Fourth Amendment in 1992.

> To conclude otherwise would authorize law enforcement officers to invite private individuals to engage in conduct that would constitute trespass were it not conducted under the guise of a search warrant. Neither the Fourth Amendment nor § 3105 grants government agents such authority.

*Buonocore*, 65 F.3d at 359.

III.

Although the exact issue of police inviting news media to observe and record the execution of an arrest warrant within a home has never been discussed by the Supreme Court or the Fourth Circuit, three other circuits have asked whether officers deserved qualified immunity under facts substantially similar to



the *Wilson* case.[16] The Second Circuit in *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995), held that "an objectively reasonable officer [on March 5, 1992] could not have concluded that inviting a television crew — or any third party not providing assistance to law enforcement — to participate in a search was in accordance with Fourth Amendment requirements," *id.* at 686. That Circuit's analysis is worth quoting at length:

> [The officer] correctly asserts that there is no reported decision that expressly forbids searching agents from bringing members of the press into a home to observe and report on their activities. He therefore argues that there was no clearly established rule prohibiting such an act. The argument lacks merit. It has long been established that the objectives of the Fourth Amendment are to preserve the right of privacy to the maximum extent consistent with reasonable exercise of law enforcement duties and that, in the normal situations where warrants are required, law enforcement officers' invasion of the privacy of a home must be grounded on either the express terms of a warrant or the implied authority to take reasonable law enforcement actions related to the execution of the warrant. [The officer] exceeded well-established principles when he brought into the [private] home persons who were neither authorized by the warrant

16. The majority misunderstands my description of the reasoning of other circuits in similar cases. *See* majority op. at 12-13. Of course I do not "rel[y]" on the "*decisions*" of these circuits to support the proposition that the law was clearly established at the time of the execution of the warrant in the Wilson home, for the simple reason that these decisions were announced *after* the execution of the warrant. However, the *reasoning* used by these circuits is instructive.

to be there nor serving any legitimate law enforcement purpose by being there. A private home is not a soundstage for law enforcement theatricals.

> The unreasonableness of [the officer's] conduct in Fourth Amendment terms is heightened by the fact that, not only was it wholly lacking in justification based on the legitimate needs of law enforcement, but it was calculated to inflict injury on the very value that the Fourth Amendment seeks to protect — the right of privacy. The purpose of bringing the . . . camera crew into the [private party's] home was to permit public broadcast of their private premises and thus to magnify needlessly the impairment of their right of privacy.

*Id.*

We should wholeheartedly agree with the foregoing discussion. *See also Hagler v. Philadelphia Newspapers, Inc.*, 1996 WL 408605, *2 - *3, 24 Media L. Rep. 2332 (E.D. Pa. July 12, 1996) (adopting and quoting the reasoning of *Ayeni*); *but see Bills v. Aseltine*, 52 F.3d 596, 602 (6th Cir. 1995) (criticizing *Ayeni* for its "failure to define narrowly the right allegedly violated, instead describing the violation in abstract and general terms").

The most recent circuit court decision to address the question, *Berger v. Hanlon*, 129 F.3d 505 (9th Cir. 1997), holds that it was clearly established in 1993 that police officers violate the Fourth Amendment when, in executing a search warrant on private premises, they planned and assisted in the television broadcasting of that search despite no mention in the warrant of any media presence, *see id.* at 510-12.



The Bergers contend that the resulting search violated their Fourth Amendment rights against unreasonable searches and seizures. We hold they are correct and that the federal officers are not entitled to qualified immunity.

> This was no ordinary search. It was jointly planned by law enforcement officials and the media, as memorialized by a written contract, so that the officials could assist in the media obtaining material for their commercial programming. The television cameras invaded the residential property of the plaintiffs and the microphone invaded their home. This search stands out as one that at all times was intended to serve a major purpose other than law enforcement. Yet, the federal agents obtained the warrant without disclosing the contract, the planned press presence, or the media's purpose. The Fourth Amendment to our Constitution protects against unreasonable searches and warrants that are obtained under false pretenses. . . . We must heed its strictures on the potential abuse of law enforcement powers. This search violated its protections.

*Id.* at 510-11.

The Ninth Circuit stressed that the extent of the law enforcement officials' involvement in planning, cooperating with and assisting the media presence was unprecedented, surpassing the more passive role played by police in cases such as *Wilson v. Layne*. *See id.* at 511-12 (distinguishing the panel opinion in *Wilson v. Layne*, 110 F.3d 1071 (4th Cir. 1997)). However, the execution of the arrest warrant at the Wilsons' home, just like the

search of the Bergers' ranch, "at all times was intended to serve a major purpose other than law enforcement." *Id.* at 510. Both searches were also intended to serve the private interests of the media. These invasions, no less than the search of the Ayeni's home, turned private property into a stage for "law enforcement theatricals." *Ayeni*, 35 F.3d at 686.

Relying on *Ayeni* and *Buonocore*, the Ninth Circuit found that the officers who orchestrated the media invasion of the Bergers' Fourth Amendment rights were unprotected by qualified immunity. *Berger*, 129 F.3d at 511. The Circuit found "even further support for this view when [it] observe[d] that no circuit court decision ha[d] ever upheld the constitutionality of a warranted search where broadcast media were present to document the incident for non-law enforcement purposes, and where the videotaping and sound recording were outside of the scope of the warrant." *Id.* The circuit recognized that the Fourth Amendment establishes a presumption that such invasions are prohibited unless justified by a warrant or by some exception to the warrant clause. In *Berger*, just as in *Wilson*, the warrant made no mention of media presence, the presence of members of the media was not reasonably necessary to assist in execution of the warrant, and no exigency presented itself that prevented the police from seeking to provide for media presence in the warrant. Because the broadcast of the search was not intended to serve law enforcement purposes but rather was undertaken, as in the case of the Wilsons, for commercial entertainment, the Ninth Circuit held that the officers did not enjoy immunity. *See id.* at 512.

The Eighth Circuit held in *Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997), that it was not



"self-evident[17] that the police offend general Fourth Amendment principles when they allow members of the news media to enter someone's house during the execution of a search warrant," and that therefore this did not violate any clearly established right as of 1994, *id.* at 447. The Eighth Circuit observed that "most courts have rejected the argument that the United States Constitution forbids the media to encroach on a person's property while the police search it," dismissing *Ayeni* and *Buonocore*[18] as "indicat[ing] at most only the beginnings of a trend in the law." *Id.*

Conspicuously absent from the *Parker* opinion is any discussion of the constitutional principle limiting an officer executing a warrant to those actions expressly authorized by the warrant or reasonably necessary to effect its legitimate law enforcement purpose. Indeed, the Eighth Circuit completely disregarded the Supreme Court's directive in *Anderson v. Creighton*, 483 U.S. 635 (1987), that it must look not only for a case on point holding that the officers' actions were prohibited, but also to related and analogous law to discover whether the unlawfulness of the officers' actions was apparent, *id.* at 640; *see also Recent Case*, 110 Harv. L. Rev. 1340, 1342-44 (1997) (The Eighth Circuit "improperly ended its inquiry after ascertaining that no case had explicitly identified such a right at the time the officers conducted their search. Instead, the court should have considered whether an existing precedent falling along the spectrum between general Fourth Amendment principles and a previous case on point clearly established a constitutional right to be free from media intrusion at the execution of a search.").

17. Whether something is "self-evident" depends on who is doing the looking.

18. And would presumably dismiss *Berger* as well.

Had the Eighth Circuit conducted the broader inquiry that *Anderson* requires, it would have considered the well-established principles recounted above, which are so central to the analysis. Perhaps, then, it would have come to a wiser result. *See id.* at 1345 ("Had the Eighth Circuit followed *Anderson*'s guidance, it might have reached a different result. Instead, it too hastily legitimated the practice of tag-along journalism. . . . Faced with an issue of increasing constitutional urgency, the court should have undertaken the more careful, nuanced analysis that *Anderson* invites.").

The majority's *en banc* opinion adds our Circuit's voice to the split between the Second and Ninth Circuits on the one hand and the Eighth Circuit on the other. Given the prevalence of real-life police dramas on television, other circuits will face this question soon enough. They will, I hope, reach a more just conclusion than have we.

IV.

Perhaps the reason for the disagreement between the majority and myself, about whether the reporters' presence was reasonably necessary to accomplish a legitimate law enforcement purpose, results from a disagreement about what that question means. I believe that the role which the reporters played at the Wilson home is a question of historical fact, which can be discovered by questioning the witnesses. In this case, the police officers have admitted both at the district court level and here on appeal that the reporters were merely bystanders and played no role in the execution of the arrest warrant itself.

The majority, on the other hand, does not treat the role of the news reporters as a question of historical fact, but rather as



one of law which itself must be clearly established. The majority asked whether it was clearly established to a reasonable police officer that the reporters could not serve a legitimate law enforcement purpose. Such an approach will exonerate even the most culpable officers.

We know that the actual purpose for which the police officers brought along the reporters was not reasonably necessary to the execution of the warrant. We need not ask whether it was clearly established that some *other* purpose, which the police officers never actually thought about, could not have reasonably been thought necessary to the execution of the warrant. But I note, for completeness, that I do not believe that the hypothetical reasons described in the majority opinion (e.g., "affording protection to the officers" or "facilitating accurate reporting," majority op. at 9) are sufficiently necessary to the execution of an arrest warrant to justify the undermining of the sanctity of the home and the fundamental principle behind the Fourth Amendment that a man's home is his castle.

The majority goes much too far when it sanctions unconsented to public tours of private homes, with photography allowed, under the guise of an arrest warrant. After today, any police officer entering a private home under a search or an arrest warrant may bring along any observer as a bystander, even an observer there only to serve his own commercial purposes or to satisfy mere curiosity. Regardless of the officers' actual reasons for bringing the third party along, this Circuit will immunize the officer because the third party's presence might have reduced the possibility that the target of the warrant would resist arrest, or because "public oversight of law-enforcement activities . . . deters crime, as well as improper conduct by law enforcement officers," *id.* Far from protecting us against tyrannical police practices, the majority's

opinion today threatens one of the most sacred rights protected by the United States Constitution. From now on in the Fourth Circuit, unlike the Second or Ninth, if ever the government need enter a private home, the home — and its occupants — can be laid bare for all the world to see.

The Fourth Amendment guarantees that the sanctity of the home, one's castle, will not be disturbed unless by warrant or pursuant to a specific warrant exception. These reporters were not mentioned in the warrant. Their presence was not justified by any exception to the warrant clause, nor was it reasonably necessary to accomplish the purposes of the warrant. These reporters were in the Wilsons' home strictly for their own commercial news-gathering purposes. When police orchestrate the entry of third parties, including newspaper reporters, into a private home without the consent of the homeowner, without the authorization of a warrant, for no legitimate law enforcement need and justified by no exigent circumstances, they violate the clearly established protections of the Fourth Amendment.

From the majority opinion, I dissent. Judges Ervin, Hamilton, Michael, and Motz join in this dissenting opinion.



## APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED APRIL 11, 1997

**PUBLISHED**

**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

No. 96-1185

CHARLES H. WILSON; GERALDINE E. WILSON; RAQUEL WILSON, next friend/mother of Valencia Snowden, a minor,

*Plaintiffs-Appellees,*

v.

HARRY LAYNE, Deputy, United States Marshal, Supervisor for the Washington Area, Operation Gunsmoke; JOSEPH L. PERKINS; JAMES A. OLIVO,

*Defendants-Appellants,*

and

RAYMOND M. KIGHT, Sheriff, Montgomery County, Maryland; JOHN DOE, Unknown Sheriff's Deputies; JOHN DOE, Unknown U.S. Marshals; UNITED STATES OF AMERICA; ERIC E. RUNION; MARK A. COLLINS; BRIAN E. ROYNESTAD,

*Defendants.*

*Appendix B*

No. 96- 1188

CHARLES H. WILSON; GERALDINE E. WILSON; RAQUEL WILSON, next friend/mother of Valencia Snowden, a minor,

*Plaintiffs-Appellees,*

v.

MARK A. COLLINS; ERIC E. RUNION; BRIAN E. ROYNESTAD,

*Defendants- Appellants,*

and

RAYMOND M. KIGHT, Sheriff, Montgomery County, Maryland; JOHN DOE, Unknown Sheriff's Deputies; HARRY LAYNE, Deputy, United States Marshal, Supervisor for the Washington Area, Operation Gunsmoke; JOHN DOE, Unknown U.S. Marshals; UNITED STATES OF AMERICA; JOSEPH L. PERKINS; JAMES A. OLIVO,

*Defendants.*

Appeals from the United States District Court
for the District of Maryland, at Greenbelt.
Peter J. Messitte, District Judge.
(CA- 94- 1718- PJM)

Argued: January 30, 1997

Decided: April 11, 1997



*Appendix B*

Before RUSSELL and WILKINS, Circuit Judges, and HERLONG, United States District Judge for the District of South Carolina, sitting by designation.

• • •

**OPINION**

WILKINS, Circuit Judge:

Charles H. Wilson and Geraldine E. Wilson (the Wilsons)[1] brought this action against federal and state law enforcement officers and others not pertinent to this appeal. The Wilsons allege that their Fourth and Fourteenth Amendment rights were violated when officers entered their home and sought to execute an arrest warrant for their son. *See* 42 U.S.C.A. § 1983 (West 1994); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395- 97 (1971). The district court granted summary judgment in part in favor of the officers, but refused to do so on the Wilsons' claim that the officers violated the Fourth Amendment by permitting two newspaper reporters to accompany them into the Wilsons' home and photograph the officers' attempt to execute the arrest warrant. The officers appeal from the decision of the district court denying them qualified immunity with respect to this claim. We reverse.

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1. Raquel Wilson joined the Wilsons as a plaintiff in this action on behalf of her daughter Valencia Snowden, the Wilson's grandchild who was present during a portion of the actions that form the basis of this lawsuit. For ease of reference, however, we refer only to the Wilsons as prosecuting this litigation.

*Appendix B*

I.

The material facts are not disputed. On April 14, 1992, federal and state law enforcement agents were engaged in a joint effort to apprehend fugitives with a history of armed, violent, criminal conduct. A team composed of Joseph L. Perkins and James A. Olivo of the United States Marshals Service and Mark A. Collins, Brian E. Roynestad, and Eric E. Runion of the Montgomery County, Maryland Sheriff's Department was formed to execute an outstanding arrest warrant.

The warrant stated:

> THE STATE OF MARYLAND, TO ANY DULY AUTHORIZED PEACE OFFICER, GREETINGS: YOU ARE HEREBY COMMANDED TO TAKE DOMINIC JEROME WILSON IF HE/SHE BE FOUND IN YOUR BAILIWICK
>
> . . . .

J.A. 124. In addition, two newspaper reporters, one outfitted with a stillshot camera, were to accompany the officers to observe and chronicle the execution of the warrant. The reporters' participation was part of a two-week, news-gathering investigation by the newspaper; it was not designed to serve any legitimate law enforcement purpose.

During the early morning hours, the officers proceeded to the address listed in police reports, as well as probation and court records, as the fugitive's home. Upon entering the residence, the officers encountered a man dressed only in undergarments who was very angry because of the intrusion. The confrontation between the man and the officers ultimately resulted in the officers



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subduing the man on the floor. In the meantime, a woman dressed in a sheer nightgown emerged from the back of the house. These two individuals were later identified as the Wilsons. The subject of the warrant, the Wilsons' son, was not present. Throughout these events, the reporters observed and photographed what transpired.[2]

The Wilsons subsequently brought this action against the federal and state officers who comprised the arrest team that entered their home, the team's supervisor, Harry Layne, and others not pertinent to this appeal. The Wilsons asserted that their constitutional rights under the Fourth and Fourteenth Amendments were violated by the officers' actions in three ways: (1) the officers used excessive force in attempting to execute the arrest warrant; (2) the officers lacked probable cause to believe that the fugitive would be found at the Wilsons' home; and (3) the officers permitted representatives of the media to enter the Wilsons' home to observe and photograph the execution of the arrest warrant. Ruling on the officers' motion for summary judgment, the district court dismissed the allegations of use of excessive force and lack of probable cause, concluding that the evidence viewed in the light most favorable to the Wilsons demonstrated that the amount of force the officers employed was reasonable and that the officers possessed probable cause to believe that the fugitive they sought would be found at the Wilsons' home. However, the district court rejected the officers' assertions that allowing the reporters to enter the Wilsons' home without their consent did not violate their constitutional rights. Furthermore, the district court refused to accept the officers' alternative argument that, at a minimum, they were entitled to qualified immunity because in April 1992, the law was not clearly established that permitting members of the media to accompany law enforcement officers

2. These photographs have never been published.

into a private residence during the execution of an arrest warrant was unconstitutional. The officers appeal this latter ruling.[3]

II.

A.

Government officials performing discretionary functions are entitled to qualified immunity from liability for civil damages to the extent that "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *E.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Winfield v. Bass*, 106 F.3d 525, 530 (4th Cir. 1997) (en banc). In analyzing an appeal from the rejection of a qualified immunity defense, our first task is to identify the specific right that the plaintiff asserts was infringed by the challenged conduct. *Taylor v. Waters*, 81 F.3d 429, 433 (4th Cir. 1996). The court then must consider whether, at the time of the claimed violation, this right was clearly established and " 'whether a reasonable person in the official's position would have known that his conduct would violate that right.' " *Id.* (quoting *Gordon v. Kidd*, 971 F.2d 1087, 1093 (4th Cir. 1992)).

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3. The district court denied the Wilsons' request to certify for immediate appeal its rulings with respect to the allegations of use of excessive force and lack of probable cause to permit those issues to be considered in conjunction with the appeal of the question of the officers' entitlement to qualified immunity. As a result, the only issue pending before us is the qualified immunity inquiry. And, because the facts are undisputed, this question presents a purely legal inquiry into whether the law was clearly established when the underlying events occurred. Thus, we may properly consider this appeal. *See Johnson v. Jones*, 115 S. Ct. 2151, 2159 (1995); *Winfield v. Bass*, 106 F.3d 525, 528-30 (4th Cir. 1997) (en banc).



The constitutional right that the Wilsons claim the officers violated, defined at the appropriate level of specificity, is their Fourth Amendment right to avoid unreasonable searches or seizures resulting from the officers' decision to permit members of the media, who were not authorized to execute the warrant and were not present to aid law enforcement efforts, to enter into a private residence, without the homeowners' consent, to observe and photograph the execution of an arrest warrant. The question before us, then, is whether in April 1992 this right was clearly established and whether a reasonable officer would have understood that the conduct at issue violated it.

B.

Early cases considering the constitutionality of law enforcement officers allowing members of the media to enter a private residence to observe or record the execution of a warrant are scarce. But, the few decisions that we have located on this issue are uniform in concluding that such conduct does not violate constitutional principles. *See Moncrief v. Hanton*, 10 Media L. Rep. (BNA) 1620, 1621-22 (N.D. Ohio Jan. 6, 1984) (rejecting argument that police violated the Fourth Amendment by permitting media to enter home and film arrest on the basis that no protected privacy interest was violated); *Higbee v. Times-Advocate*, 5 Media L. Rep. (BNA) 2372, 2372-73 (S.D. Cal. Jan. 9, 1980) (declining to accept plaintiff's assertion that officers violated his constitutional rights by inviting the press to be present during the execution of a search warrant at his residence); *Prahl v. Brosamle*, 295 N.W.2d 768, 774 (Wis. Ct. App. 1980) (rejecting claim that officers infringed the Fourth Amendment by allowing a television reporter to enter plaintiff's property and film search, reasoning "that the filming and television broadcast of a reasonable search and seizure, without more, [do not] result in unreasonableness").

Subsequently, in *Bills v. Aseltine*, 958 F.2d 697 (6th Cir. 1992), which was decided approximately one month prior to the incident under review, the court held that law enforcement officers may violate the Fourth Amendment by permitting a security guard to accompany them into a private residence to execute a search warrant and to engage in a search for items that were not described in the warrant. *Id.* at 701-05. The court explained:

> [W]here an intrusion is justified, whether by warrant or by probable cause and exigent circumstances, police are temporarily placed in control of the premises and its occupants. It is as though the premises were given to the officers in trust for such time as may be required to execute their search in safety and then depart. Officers in unquestioned command of a dwelling may violate that trust and exceed the scope of the authority implicitly granted them by their warrant when they permit unauthorized invasions of privacy by third parties who have no connection to the search warrant or the officers' purposes for being on the premises. The warrant in this case implicitly authorized the police officers to control and secure the premises during their search. . . . It did not implicitly authorize them to invite a private security officer to tour plaintiff's home for the purpose of finding [evidence not specified in the search warrant]. . . .

*Id.* at 704-05 (internal quotation marks omitted). Based on this reasoning, the Court of Appeals for the Sixth Circuit held that the officers' conduct presented a jury question concerning whether the officers had exceeded the scope of the search warrant and remanded for further proceedings. *Id.* at 705.





Such was the state of the law in April 1992 when the events underlying this litigation occurred. No court had held unconstitutional conduct similar to that in which the officers here engaged, and in fact those courts addressing the constitutionality of similar conduct had expressly upheld it. Moreover, the only court to have found a constitutional problem with a third party accompanying officers to execute a warrant had done so under circumstances in which the officers had exceeded the scope of the warrant by allowing the third party to undertake an independent search for items that were not specified in the warrant — circumstances remarkably unlike those presented by this action.

Subsequent to the events underlying this action, the Court of Appeals for the Second Circuit addressed exactly the question presented here in *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), and held that it was clearly established in March 1992 that officers violated the Fourth Amendment when they permitted a television crew to enter a private residence and film the execution of a search warrant that provided no authorization for their presence. *Id.* at 684-86. The court reasoned that although there were no decisions expressly holding that searching agents violate the Constitution by bringing members of the press into a home to observe and report on their activities, it had

> long been established that the objectives of the Fourth Amendment are to preserve the right of privacy to the maximum extent consistent with reasonable exercise of law enforcement duties and that, in the normal situations where warrants are required, law enforcement officers' invasion of the privacy of a home must be grounded on either the express terms of a warrant or the implied authority to take reasonable law enforcement actions related to the execution of

> the warrant. [The defendant officer] exceeded well-established principles when he brought into the Ayeni home persons who were neither authorized by the warrant to be there nor serving any legitimate law enforcement purpose by being there.

*Id.* at 686. Furthermore, the court held that an objectively reasonable officer could not have failed to appreciate "that inviting a television crew — or any third party not providing assistance to law enforcement — to participate in a search was [not] in accordance with Fourth Amendment requirements." *Id.*

The Court of Appeals for the Eighth Circuit, however, on materially identical facts, reached the opposite conclusion in *Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997), also decided after the events relevant to this litigation. Relying on the dearth of authority holding the conduct in question to be violative of the Fourth Amendment, the existence of decisions holding that these types of actions by law enforcement officers did not transgress constitutional principles, and the lack of Supreme Court direction on the question, the *Parker* court held that officers were entitled to qualified immunity. *Id.* at 447. We agree.

Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). It protects law enforcement officers from "bad guesses in gray areas" and ensures that they are liable only for "transgressing bright lines." *See Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992). Thus, although the exact conduct at issue need not have been held to be unlawful in order for the law governing an officer's actions to be clearly established, the



existing authority must be such that the unlawfulness of the conduct is manifest. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987). When these officers acted, however, the smidgen of case law that had considered the constitutionality of permitting the media to accompany officers into a private residence while they executed a warrant had found no constitutional infirmity with the practice.[4] Further, we cannot agree with the Court of Appeals for the Second Circuit that simply because the objective of the Fourth Amendment is to preserve privacy in the home to the greatest extent possible consistent with reasonable law enforcement efforts, the unlawfulness of the officers' conduct must have been apparent. *See DiMeglio v. Haines*, 45 F.3d 790, 803-04 (4th Cir. 1995) (explaining the importance of examining the law at the appropriate level of particularity to decide whether it is clearly established to such an extent that a reasonable officer would understand the illegality of the conduct at issue).

We stress that we are not called upon to determine whether the officers' conduct was constitutional or appropriate, only whether the legal landscape when these events occurred was

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4. In support of their contention that the law was clearly established, the Wilsons also rely on *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978). This case is inapposite. In *Houchins*, the Supreme Court considered whether First Amendment rights asserted by a television station were violated by prohibiting representatives of the station from filming inside a prison. A plurality of the Court — in a footnote to a recitation of the explanations offered by prison officials for preventing the filming, one of which was that it would infringe on inmate privacy — wrote that inmates "retain certain fundamental rights of privacy; they are not like animals in a zoo to be filmed and photographed at will by the public or by media reporters, however 'educational' the process may be for others." *Id.* at 5 n.2. This footnote provides no support for the existence of a clearly established Fourth Amendment right prohibiting a law enforcement officer from permitting a member of the media to accompany him into a private residence during the execution of an arrest warrant.

sufficiently developed that it would have been obvious to reasonable officers that the actions at issue were violative of the Fourth Amendment. Because in April 1992 it was not clearly established that permitting media representatives to accompany law enforcement officers into a private residence to observe and photograph their attempt to execute a warrant would violate the homeowner's constitutional rights, we hold that these officers are entitled to qualified immunity.[5] Consequently, we reverse the

5. Our decision in *Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995), does not dictate a contrary result. The facts underlying *Buonocore* were essentially identical to those at issue in *Bills*: Officers allowed a security guard to enter a private residence and conduct a search for property not authorized by a warrant. In the appeal from the denial of summary judgment to the officers, we characterized the issue presented as whether it was clearly established on November 24, 1992 that "Fourth Amendment law prohibited government agents from bringing a private citizen into Buonocore's home to conduct an independent, general search for items not identified in any warrant." *Id.* at 353 (internal quotation marks omitted). And, we held that it was, reasoning:

> [W]e have no doubt that the Fourth Amendment prohibits government agents from allowing a search warrant to be used to facilitate a private individual's independent search of another's home for items unrelated to those specified in the warrant. Such a search is not reasonable. It obviously exceeds the scope of the required specific warrant and furthermore violates the sanctity of private dwellings.

*Id.* at 356 (internal quotation marks omitted). *Buonocore*, therefore, addressed the question of whether a third party, who is not authorized by the warrant to conduct a search, may accompany law enforcement officers in executing a warrant and undertake an independent search for items not described in the warrant — an issue much different than the one presented to us.

Here, the Wilsons agree that the reporters who accompanied the officers into their home did not engage in a search of, or intrude into, any areas of their

(Cont'd)



decision of the district court refusing to grant summary judgment in favor of the officers.

*REVERSED*

RUSSELL, Circuit Judge, dissenting:

I cannot agree with the majority's disposition that the officers have not violated clearly established law. The Fourth Amendment prohibits "unreasonable searches and seizures." It is not reasonable for officers to invite reporters into a private home while they execute an arrest warrant. In this case, the act of bringing reporters into the Wilsons' home, and allowing them to take photographs and remain in the home, was particularly unreasonable. The officers clearly had the wrong man, and the reporters, complete strangers to the Wilsons, photographed them in embarrassing states of undress.

At 6:45 in the morning, plainclothes officers entered the Wilsons' home while Mr. and Mrs. Wilson were lying in bed.

(Cont'd)

home into which the officers would not have been permitted to go. Moreover, the Supreme Court has indicated that a seizure only occurs when there has been a "meaningful interference with an individual's possessory interests in . . . property" — a circumstance not alleged here. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *see also Arizona v. Hicks*, 480 U.S. 321, 324 (1987) (recording the serial numbers on equipment "did not meaningfully interfere with respondent's possessory interest in either the serial numbers or the equipment, and therefore did not amount to a seizure" (internal quotation marks omitted). *But see Ayeni*, 35 F.3d at 688. Although an application of this definition indicates that the photographic images captured by the reporters were not seized within the meaning of the Fourth Amendment, we need not decide this issue because, at a minimum, it was not clearly established that it was.

Hearing a commotion, Mr. Wilson, wearing only his undershorts, got up to investigate, and encountered a number of plainclothes officers with guns in his living room. When Mrs. Wilson, wearing only a thin, sheer nightgown, came out of the bedroom, she found her husband face down on the floor with an officer holding a gun to his head.

The officers should have immediately realized that Charles Wilson was not Dominic Wilson. A photograph and description of Dominic Wilson given to the officers identified him as 27 years old, 185 pounds and clean shaven. Charles Wilson, Dominic's father, was 47, weighed 220 pounds, and wore a beard that was almost completely white. Nonetheless, Charles Wilson was kept face down on the floor for at least 10 minutes while the police determined that Dominic Wilson was not in the house.

While all this was going on, two *Washington Post* reporters took photographs of the scene and the interior of the Wilsons' home. The reporters, a male and a female, had entered the Wilsons' home with the officers and at their invitation.

I believe the officers acted unreasonably in this case, first by allowing the reporters into the home, and then by permitting them to take photographs of Mr. Wilson face down on the floor in his undershorts, and Mrs. Wilson in her sheer nightgown. I agree with the Second Circuit's analysis that Fourth Amendment jurisprudence long ago clearly established that police may not invite reporters into private homes when they are executing warrants if those reporters are neither "expressly nor impliedly authorized to be there." *Ayeni v. Mottola*, 35 F.3d 680, 686 (2d Cir. 1994). Furthermore, the majority reads our opinion in *Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995), too narrowly. Although the strict holding of *Buonocore* addressed the issue of



third parties who accompanied officers on the execution of a search warrant, and then exceeded the limits of the warrant, the opinion can be fairly read to prohibit "government agents from bringing a private citizen into [the Wilsons'] home" whose presence is unrelated to the execution of the warrant. *Id.* at 353.

Finally, because the Supreme Court is not likely to offer guidance in this area anytime soon, *see Parker v. Boyer*, No. 96-883, 1997 WL 73486 (U.S. Feb. 24, 1997), *denying cert. to* 93 F.3d 445 (8th Cir. 1996) (no clearly established law prevented reporters from entering private home with police), I would use this opportunity to apply the analyses of *Ayeni* and *Buonocore* to these facts.

I respectfully dissent.

## APPENDIX C — EXCERPTS OF TRANSCRIPT OF MOTIONS HEARING DATED DECEMBER 4, 1995

Case No.: PJM-9-1718

6500 Cherrywood Lane
Greenbelt, MD 20770
December 4, 1995

CHARLES H. WILSON, ET AL.,

Plaintiffs,

v.

RAYMOND M. KNIGHT, ET AL.,

Defendants.

TRANSCRIPT OF MOTIONS HEARING
(EXCERPT: OPINION OF THE COURT)
BEFORE THE HONORABLE PETER J. MESSITTE
UNITED STATES DISTRICT COURT JUDGE

* * *

THE COURT: All right. I'm going to give you my decision now, gentlemen, ladies.

This matter is a suit of Charles H. Wilson, et al., against defendants, Mark Collins, Harry Layne, Joseph Perkins, Brian Roynestad, and Eric Runion. It is a civil action for damages and declaratory relief allegedly to redress deprivations of certain civil rights under 42 USC Section 1983 and also with regard to the





federal agents under [*Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971)].

Plaintiff Charles Wilson and, I gather, his wife, Geraldine Wilson, are residents of Montgomery County[, Maryland]. The minor plaintiff in the case is Valencia Snowden through her mother and next friend, Raquel [Snowden].

Defendants Collins, Runion, and Roynestad are Montgomery County deputy sheriffs. Defendant Harry Layne was at relevant times in this suit a supervisory deputy U.S. marshal in the U.S. Marshal's Office for the Superior Court of the District of Columbia and site supervisor for the Washington, DC operation [of "Operation Gunsmoke"]. Defendants Perkins and Olivio were deputy U.S. marshals who were involved in the incident that I will describe momentarily. And defendant United States of America is in the case by reason of the fact that the U.S. Marshal Service are employees of same were involved in this transaction.

It appears that in or about February of 1992, the U.S. Marshal Service in a joint effort with the Montgomery County Sheriff's Department engaged in a pursuit of hard-core fugitives including parole and probation violators, an operation called Operation Gunsmoke. Defendant Layne was the Washington area supervisor of this venture. And Montgomery County, pursuant to memorandum of understanding on or about February 12, 1992 executed by their sheriff, agreed to participate in this joint venture, Operation Gunsmoke.

The events in question began in or about April of 1992 when the Circuit Court for Montgomery County issued a bench warrant for the arrest of one Dominic Jerome Wilson based on alleged violation of probation. Wilson was apparently on probation for,

as I understood it, robbery at the time. He also had a record which involved elements of violence in his past and was specifically — it was noted to the arresting officers that he was potentially armed and could be dangerous and violent. That was part of the factual base at the time.

In the records of the Montgomery County Sheriff Department, Dominic Wilson had listed as his address 909 North Stone Street Avenue in Rockville and that those records also were similar to records that were held by the probation office involved with active probation that Wilson was being sought for violation of. And that that address had been listed on numerous occasions by Wilson as his address. It turns out that the address was, in fact, the home of Charles and Geraldine Wilson, the parents of Dominic Wilson.

With that information and with the warrant in hand, various of the defendants came upon the 909 North Stone Street address at approximately 6:30 a.m. on April 16, 1992. Now, as I understand it, all the defendants but Layne were on site at that time, is that correct, both the sheriffs and the marshals.

According to the allegations of the defendants, just before they knocked on the door, they had taken into custody the brother of Dominic Wilson on a presumably unrelated charge. And he had been driven to the front of the premises and had indicated some time within 30 to 45 minutes prior to the entry that, in fact, Dominic Wilson lived at that address and, in fact, had been there the night before.

The further indication is that at approximately 6:45 a.m. when the defendants knocked at the address, the child, Valencia Snowden, then nine years old, as it happened the daughter of



Dominic Wilson, although that was not known to the officers at the time, answered the door. The allegation of the defendants is that when she answered the door, the inquiry was is Dominic Wilson at home and she answered she didn't know. And then presumably there is some dispute about whether there was a knock and announce, although the officers indicate that they announced that they were there with a warrant for the arrest of Dominic Wilson.

The officers then entered into the home at this early morning hour. And plaintiffs, Charles and Geraldine Wilson, were in their bedroom in bed. They heard commotion and got up, came to the door, and were confronted by Perkins, Olivio, and Collins pointing guns and that Mr. Wilson raised his hands and stood still. He was only dressed in his undershorts. According to the plaintiffs, the defendant did not identify themselves. They say that he did. In any event, there was an alleged statement by Perkins to Wilson at gunpoint to "get the fuck on the floor." And then at that point Wilson was forced to the floor as he was complying with Perkins' order. It is alleged also by Wilson that [Olivo] put his knee into Wilson's back and held the gun to his head while he lay on the floor. And that Geraldine Wilson came to the scene and observed what went on while all this was happening.

There was questioning about the whereabouts of Dominic Wilson, the adult son of the plaintiffs. The defendants had photographs of Dominic Wilson, and they showed the photographs. And it was obviously not the same person as Charles Wilson whom they encountered at that time. It is alleged by the plaintiffs that they indicated that first of all, that plaintiff Charles Wilson was not Dominic Wilson, that Dominic Wilson did not live there, and that he wasn't there, and that he hadn't been seen for two weeks. And that was apparently confirmed by

Mrs. Wilson. There was some alleged threats that the Wilsons might be incarcerated if Wilson was found in their house, that is Dominic Wilson. In any event, there was a search for the home. Nobody else was in the home other than the child. Mr. Wilson indicates that he was forcibly restrained on his living room floor at gunpoint for approximately 10 minutes including, he says, after defendants had verified the there was no one else in the home. Then the defendants left. Apparently there was also some alleged shouting by the defendants at Mr. Wilson. The defendants say that Mr. Wilson himself shouted and used epithets during that time.

That is essentially the factual predicate of the case as far as any alleged physical imposition upon the plaintiffs.

The other fact of some significance is in the case that, pursuant to a media ride along policy that was apparently in effect in at least this region of the marshal's service, one or more reporters and/or photographers from the Washington Post accompanied marshals and sheriffs in their operations including in the Wilson home on that evening. And it appears that either one — were there two total, a photographer and a reporter? That both may have entered the home that [morning]. And the photographer, I think it is stipulated, did take pictures of Mr. Wilson when he was in custody under arrest, possibly on the floor in his undershorts being restrained as he was. And that they were not in the home with the consent of the Wilsons, but they simply tailed along, piggybacked on the warrant that the officers had with regard to Dominic Wilson

This suit has followed, and in the second amended complaint, there are allegations against all of the defendants in this case, specifically with regard to all who entered the premises, that there



was an unlawful entry and search in the case. And secondly, that there was an unlawful search in that the media was brought in to accompany the officers who were operating pursuant to the arrest warrant. And third, that once inside, one or more of the officers applied excessive force to the Wilsons in trying to execute this warrant. There is no dispute that Dominic Wilson was not found on the premises at that time, and eventually the officers all departed.

The Court will address these several issues now as it has various motions for summary judgment filed before it, motions by the individual defendants, both county and federal.

* * *

Which [brings] us to the third claim that is alleged against the defendants.

* * *

THE COURT: Let us stay with the third cause of action against which alleges essentially unreasonable search and seizure based on what is said to be the unauthorized presence of the Washington Post reporter and photographer. Now, this is characterized as possibly negligence or gross negligence or intentional infliction of emotional distress or trespass or invasion of privacy or some such. It comes in a lot of different forms. For present purposes, I'll just address it as an unreasonable search and seizure.

The argument that is made by the plaintiffs with regard to the presence of the officers is that that violates Fourth Amendment rights, and essentially, if you will constitutes an invasion of privacy.

I think that's really the essence – or trespass. That's the essence of what we're talking about. And that particularly insofar as the home is involved, that that is a particularly protected location.

The analysis that the defendants offer in this regard is that, assuming that a specific right has been allegedly violated, that at the time of the violation, [April 16, 1992], that right was not clearly established. And even if it was clearly established, then a reasonable person in the officer's position would have known that — in this case, would not have known according to the defendants that what he was doing would violate that right. The defendants cite some cases from other jurisdictions in which it was held as of the — some time in or about the time frame that these events occurred that the presence of a third person, such as reporters, would not rise to the level of a constitutional tort. And among the cases that are relied on showing decisions directly contra were [*Moncrief v. Hanlon*, 10 Med. L. Rptr. (BNA) 1620 (N.D. Ohio Jan. 6, 1984),] where a news media accompanied police into a search. And the federal court in Ohio objected the holding that there was a constitutional tort stated. [*Higbee v. Times Advocate, Inc.*, 5 Med. L. Rptr. (BNA) 2372 (S.D. Cal. Jan. 9, 1980], to the same effect; and [*Prahl v. Brosamle*, 294 N.W.2d 768 (Wis. Ct. App. 1980)]. And that that is meant to show that there was no clearly established right. The defendants also rely on a more recent case from the Sixth Circuit, [*Bills v. Aseltine* 52 F.3d 596 (6th Cir. 1995)]. And all that is meant to suggest that the right, whatever it was, was not clearly established at the time.

The plaintiffs rely principally on a case from the Second Circuit, [*Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995)], where television reporters seeking on-the-scene coverage of dramatic event had accompanied law



enforcement officers inside homes in connection with raids that were being made there. The Second Circuit, Chief Judge Newman writing the opinion – I think I indicated the cite, 35 F.3d 680 — went on to discuss the issue in this case. And he was citing some — actually, March 1992 was the date of the actions in the *Ayeni* case.

And the Second Circuit said [at] 35 F.3d at 686:

> Agent Mottola correctly asserts that there is no reported decision that expressly forbids searching agents from bringing members of the press into a home to observe and report on their activities. He therefore argues that there was no clearly established rule prohibiting such an act.

The Court says:

> The argument lacks merit. It has long been established that the objectives of the Fourth Amendment are to preserve the right of privacy to the maximum extent consistent with reasonable exercise of law enforcement duties. And that in the normal situations where warrants are required, law enforcement officers' invasion of privacy of a home must be grounded on either the express terms of a warrant or the implied authority to take reasonable law enforcement actions related to the execution of the warrant. Mottola exceeded well established principles when he brought into the [Ayeni] home persons who were neither authorized by the warrant to be there nor serving any legitimate law enforcement purpose by being there. A private home is not a sound stage for law enforcement theatricals.

*Appendix C*

> The unreasonableness of Mottola's conduct in Fourth Amendment terms is heightened by the fact that not only was it wholly lacking in justification based on the legitimate needs of law enforcement, but it was calculated to inflict injury on the very value that the Fourth Amendment seeks to protect, the right of privacy. The purpose of bring the CBS camera crew into the [Ayeni's] home was to permit public broadcast of their private premises, and thus to magnify needlessly the impairment of their right to privacy.

In [*Buonacore v. Harris*, 65 F.3d 347 (4th Cir. 1995)], a case just decided in the last two months by the Fourth Circuit, we have some interesting parallels. There the opinion was written by Judge [Motz] of the circuit. The two law enforcement officers, after obtaining a warrant to search a home, invited a private person to engage in an independent general search of the home for items that were not mentioned in the warrant. Apparently it was a telephone company operator looking for tools or equipment. And an action was brought by the homeowner alleging violations of his civil rights, and the defense of qualified immunity was offered. Summary judgment was moved, and it was refused by the trial court, and the appeal was dismissed by the Fourth Circuit, but there is ample discussion in the case about the qualified immunity issue and whether bringing along a private person to aid in a search would pass muster under the Fourth Amendment. And it is clearly the decision of [the court that] whether or not there was a cause or action that could go forward obviously depend[ed] on whether the specific right violated was clearly established at the time.

The Fourth Circuit discussion, as I was saying, gets into a great deal of consideration of general warrants and whether in



*Appendix C*

effect bringing in a private person as part of a specific warrant in effect breached the clearly established right of someone not to have the privacy of their home breached by someone who was not an official and not acting pursuant to a specific warrant. And if you look at the language in the opinion, there's a great deal of discussion about the importance of the privacy of the home. Just looking randomly at 65 F.3d [at] 355, speaking about James Otis,

> General warrants were not directed solely at authorized officers acting on behalf of the government but could be executed at the request of anyone. And because they had constituted an improper invasion, indeed annihilation of a person's cherished right to privacy, particularly in his own house, they were objectionable.

And going on at page 356:

> Similarly, the special protection to be afforded to person's right to privacy within his own home has also been continuously and consistently recognized by the Court.

And the Court essentially goes on to talk in terms of specific warrants in that case and finds that apparently despite other cases that were analogous such as the ones at hand, that even if there were no cases reported directly on point that would not be enough to prove that the right was not clearly established.

"Clearly established," said the Court of Appeals, "in this context includes not only specifically adjudicated rights but those manifestly included within more general applications of the core constitutional principle invoked, the right to be free from

government officials facilitating a private person's general search of the sort Buonacore alleges was conducted here is manifestly included within core Fourth Amendment protection."

And then most importantly at footnote seven of the opinion, there's a discussion of the [*Ayeni*] case by the Fourth Circuit, and this just being a few months ago. It is indicated that the [*Ayeni*] decision was not squarely on point, but it was deemed sufficiently analogous. And that certainly suggests that the Fourth Circuit was sympathetic to the [*Ayeni*] analysis.

Well, having considered these facts, the Court, first of all, determine[s] whether or not there was any objective reason for the media people to be present. And the Court determines that there clearly would have been a specific right, a constitutional right to be free from unreasonable searches and seizures. And whether you add the invasion of privacy or trespass element to it, the fact it there was a constitutional right it be free from unreasonable searches and seizures, and the presence of a media officer or media individual is not serving any legitimate law enforcement purpose.

The question then becomes whether that right was clearly established as of April 1992 when this matter occurred. If you look at [*Buonacore*], of course, that's a case that arose as of November [1992], although it was just decided. And the Second Circuit and in my view the Fourth Circuit understand that there are certain core rights involving the Fourth Amendment that are abridged regardless of whether there are either no cases that go contra or, frankly, if there are a few cases that go contra as there were here, the Ohio and California and Wisconsin cases. Because in the Court's view, there is a core constitutional right here, to be free from unreasonable searches and right here, to be free from



unreasonable searched and seizures, and that was clearly established as of April of [1992] when these events took place.

Frankly, I think you can analyze this as a breach of the requirement for a specific warrant. That what you've got here are people who are operating, if not directly in aid of a — and in a way, one could argue that they were trying to operate in aid of law enforcement. But to the extent that they weren't, they were in the house, snooping around, looking around, participating in one fashion or another with both the search of the premises for the individual, who was not found, and the seizure of the Wilsons, who were detained and actually photographed by the photographer. So that the right was clearly established. And any reasonable officer should have known that what was going on was a violation of a clearly established right.

* * *

MR. ST. HILAIRE: Yes, Your Honor. Just two things I went to make clear. Your Honor is holding that the statement — well, the allegation that taking the press inside the residence states a Fourth Amendment violation and that it was clearly established in 1992.

THE COURT: That's right.

MR. ST. HILAIRE: Okay. We want to make clear because we have to consult with the solicitor general to determine whether an interlocutory appeal —

THE COURT: My statement is that specifically taking — well, analytically I wouldn't say that it's strictly taking the media in. I think, if you ask my view, more generally taking any

unauthorized person into a home violates the Fourth Amendment. Now, we can be more precise about this case and say taking a Washington Post reporter or any media person, whether it's radio, TV — I mean, you're asking me to expand how far I go. It happens to be newspaper people and photographers. But I think taking media people in certainly to observe, photograph, and do whatever constitutes a violation of the Fourth Amendment. I reason though from a much more general base, which is anybody who's unauthorized, frankly, as I read these cases, would constitute an unreasonable search and seizure. I don't think that you can use the authorization of a warrant to bring in anybody for any reason unless arguably you've really get somebody in aid of some sort of an arrest I guess. I don't know. There may be some imaginable circumstances, but they're few and far between.

No. 98-83

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

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CHARLES WILSON, GERALDINE WILSON, and RACHEL SNOWDEN, next friend/mother of VALENCIA SNOWDEN, a minor,

*Petitioners,*

v.

HARRY LAYNE, JAMES A. OLIVO, JOSEPH L. PERKINS, MARK A. COLLINS, ERIC E. RUNION, and BRIAN E. ROYNESTAD,

*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## RESPONDENTS' BRIEF IN OPPOSITION

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STUART M. NATHAN
JOHN B. HOWARD
Office of the Attorney General
of Maryland
200 St. Paul Place, 2d Floor
Baltimore, Maryland 21202
(410) 764-4070

RICHARD A. CORDRAY
*Counsel of Record*
JAMES A. ANZELMO
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

*Attorneys for Respondents*

## QUESTION PRESENTED

Whether law enforcement officers violated Fourth Amendment law which was clearly established in April of 1992, thus invalidating their defense of qualified immunity, when they followed the apparently valid terms of a Justice Department policy that allowed members of the news media to accompany them and report on their conduct in properly executing a valid warrant?

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**No. 98-83**

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1998

CHARLES WILSON, GERALDINE WILSON, and RACHEL SNOWDEN, next friend/mother of VALENCIA SNOWDEN, a minor,

*Petitioners,*

v.

HARRY LAYNE, JAMES A. OLIVO, JOSEPH L. PERKINS, MARK A. COLLINS, ERIC E. RUNION, and BRIAN E. ROYNESTAD,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

The petition for a writ of *certiorari* in this case should be denied. The specific issue decided below was whether law enforcement officers violated Fourth Amendment law which was clearly established in April of 1992, thus invalidating their defense of qualified immunity, when they allowed members of the news media to accompany them and report on their conduct in properly executing a valid warrant. Unlike any of the other circuit cases cited by petitioners, the law enforcement officers

in this case were following the apparently valid terms of a Justice Department policy that discussed and endorsed their authority to allow members of the news media to accompany them and report on their actions. In this situation, there is no circuit split over whether these officers were acting in bad faith or disregarding clearly established law such that they should be subjected to personal liability in monetary damages for obeying and applying that policy. Respondents in this case were simply implementing the terms of a facially valid policy, issued upon the Justice Department's undisputed legal authority, which appeared at the time to be binding on officials at their level of authority. They are entitled to a defense of qualified immunity in these circumstances.

## COUNTERSTATEMENT OF THE CASE

This case arose out of Operation Gunsmoke, a federal initiative approved by then-Attorney General William Barr, in which U.S. Marshals teamed with state and local officials to apprehend dangerous criminals, in particular, armed fugitives who had been charged with or convicted of crimes involving violence with weapons. The arrests of Dominic and Marc Wilson (petitioners' sons), which prompted this lawsuit, were made by a joint team of U.S. Marshals and local officers pursuant to their combined authority under this initiative. *See* J.A. 17-19.[1] Petitioners brought this action under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). Several other facts complete the factual background to this case.

Petitioners fail to mention that the law enforcement officers in this case were acting in accordance with the terms of a directive that had been issued and approved by the Justice Department. At the time of the actions at issue in this case -- April of 1992 -- the U.S. Marshals Service was operating under a formal written policy governing "media ride-alongs." *See* J.A. 61-65 (U.S. Department of Justice, U.S. Marshals Service Policy on "Media Ride-Alongs"). This policy discussed and

[1] As in the petition, citations to the record here are to the Joint Appendix ("J.A.") that was prepared and filed in the court below.



endorsed the authority of law enforcement officers to allow members of the news media to accompany them in order to observe and record what actually happens during the execution of an arrest warrant. It expressly referred to their authority to allow media personnel to accompany them inside a building or residence as they properly executed a valid warrant. *See id.* at 62 ("If the arrest is planned to take place inside a house or building, agree ahead of time on when the camera can enter and who will give the signal."). It also noted that "[k]eeping the public adequately informed of what the Service does can be viewed as a duty in its own right, and we depend on the news media to accomplish that." *Id.* at 61; *see also id.* ("Media 'ride-alongs' are one effective method to promote an accurate picture of Deputy Marshals at work.").

The department policy on "media ride-alongs" was facially valid and had never been challenged or criticized by any court. Indeed, at the time, only three courts had specifically addressed the propriety of the actions addressed by the policy, and all three had rejected constitutional challenges to the lawfulness of the officers' conduct. *See, e.g., Moncrief v. Hanton*, 10 Med. L. Rptr. 1620 (N.D. Ohio 1984); *Higbee v. Times-Advocate, Inc.*, 5 Med. L. Rptr. 2372 (S.D. Cal. 1980); *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. Ct. App. 1980). After the policy had been in effect for some time, and after the events giving rise to this case had already transpired, a court ruled for the first time that such conduct violated the Fourth Amendment. *Ayeni v. CBS, Inc.*, 848 F. Supp. 362 (E.D.N.Y.), *aff'd sub nom. Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995). Immediately thereafter, the Justice Department amended the policy to eliminate the "media ride-along" component. *See* J.A. 65-75 (Policy Notice Mar. 21, 1994).

Also, in other rulings not at issue here, the District Court upheld the validity and the reasonableness of the arrest warrant for Dominic Wilson and determined that the officers did not use excessive force in executing the warrant. J.A. 24-28. As for the reporters, they did nothing more in this case than accompany the law enforcement officers as they properly executed the valid arrest warrant for Dominic Wilson, in order

to observe and report on their actions. They were not involved in executing the warrant or assisting the officers in doing so. *See* Pet. App. 70a; *see also* J.A. 61 ("Ride-alongs, as the name implies, are simply opportunities for reporters and camera crews to go along with Deputies on operational missions so they can see, and record, what actually happens."). The reporters photographed only those scenes that were already in the officers' plain view, and none of those photographs has ever been published. *Id.* at 55a n.2.

## REASONS FOR DENYING THE WRIT

The most important fact about this case, which wholly vindicates the ruling below on the qualified immunity issue, is that respondents were following the terms of a binding and apparently valid policy issued by the U.S. Justice Department, which had never been challenged or criticized by any court. The effect of that policy is to underscore the good-faith conduct of these officers and to confirm that they were not disregarding clearly established law to violate petitioners' rights. Any holding to the contrary would require law enforcement officers to act on their own initiative to disregard the chain of command and to exercise their own untutored legal judgment by making guesses about whether to follow certain policies and disobey others to shield themselves from personal liability.

Although petitioners are correct in noting that there is a conflict among the circuits on the general issue raised in this case, the existence at the time of a specific and controlling departmental policy renders this case distinguishable from the other cases cited by petitioners. This case thus offers a poor vehicle for cleanly resolving that extant circuit split. In addition, because at the time these officers acted, no controlling decision and indeed no decision by *any* court *anywhere* in the country had ruled that their actions were unlawful, the ruling below accords with the Court's precedents governing the defense of qualified immunity. The Court has consistently admonished that public officials must be judged by law that is clearly established at the time, and they simply "cannot be expected to predict the future course of constitutional law."



*Procunier v. Navarette*, 434 U.S. 555, 562 (1978). In the particular circumstances of this case, therefore, no purpose would be served by granting plenary review of the qualified immunity issue raised under the Fourth Amendment.

### I. QUALIFIED IMMUNITY IS PROPER FOR THESE OFFICERS, WHO DID NOT DISOBEY THE TERMS OF A BINDING AND FACIALLY VALID POLICY ON "MEDIA RIDE-ALONGS."

At the time of the events at issue here (April of 1992), the United States Marshals Service in the Justice Department had issued a binding and apparently valid policy governing "media ride-alongs," which had never been challenged or criticized by any court. *See* J.A. 61-65. This policy is material to show that the officers were acting in good faith when they permitted the reporters to accompany them and report on their conduct in properly executing a valid arrest warrant. *See, e.g., V-1 Oil Co. v. Wyo. Dep't of Envtl. Quality*, 902 F.2d 1482, 1488-89 (10th Cir.) (any reasonable officer -- who conducts a search "on the same day he was advised by fully informed, high-ranking government attorneys that a particular statute, which had not yet been tested in any court, lawfully authorized that particular search -- should not be expected to have known that the search was unconstitutional"), *cert. denied*, 498 U.S. 920 (1990). To rule otherwise would force individual law enforcement officers to make their own decisions about whether and when to follow department policies that appear to be valid and binding upon them. In the field of law enforcement, in particular, the result would be chaos that would undermine the central mission of protecting the public safety.

The Court has decided that government officials performing discretionary functions are immune from suit unless their conduct violated "clearly established" constitutional rights about which a reasonable person would have known at the time of the events in question. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The officers involved in Operation Gunsmoke were acting in accordance with all of the Justice Department's policies, which had been reviewed and approved by superior

officers and, it is reasonable to assume, by their legal advisors. Among those directives was the policy on "media ride-alongs," which clearly authorized and approved of this practice and, indeed, provided lengthy practical pointers about how to conduct and manage these situations. *See* J.A. 61-65. No reasonable person at their position in the chain of command would have believed that these officers were obliged to disobey the terms of this department policy in order to refrain from violating petitioners' "clearly established" constitutional rights. *See, e.g., Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994) (officers implementing long-established policy are entitled to qualified immunity when no then-existing case law demonstrated that the particular policy was unconstitutional and the only appellate case on point had upheld a similar policy), *cert. denied*, 115 S. Ct. 1097 (1995); *Sullivan v. Town of Salem*, 805 F.2d 81, 87 (2d Cir. 1986) ("if those officers . . . were simply implementing an established policy of the town, then they would have available to them a defense of qualified immunity from personal liability"); *Wallace v. King*, 626 F.2d 1157, 1161 (4th Cir. 1980) ("law enforcement officers should not be held personally liable for monetary damages because they have followed the policy or instructions of their superiors, where the controlling law had not been authoritatively decided"), *cert. denied*, 451 U.S. 969 (1981).

To defeat a defense of qualified immunity, the contours of the constitutional right alleged to be violated "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right," which requires that "in the light of preexisting law, the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). An important feature of that "preexisting law" in April of 1992 was the department policy *itself*, which indicated that media ride-alongs were lawful, even if the officers and accompanying media personnel proceeded into a residence to execute a warrant. *See* J.A. 62 ("If the arrest is planned to take place inside a house or building, agree ahead of time on when the camera can enter and who will give the signal."). Supervisory personnel at the Justice Department had approved and issued



this policy in order to further the important aim of facilitating effective law enforcement by educating the public and providing an accurate account of what the Marshals Service does day in and day out. *See* J.A. 61 ("The U.S. Marshals Service, like all federal agencies, ultimately serves the needs and interests of the American public when it accomplishes its designated duties. Keeping the public adequately informed of what the Service does can be viewed as a duty in its own right, and we depend on the news media to accomplish that.").

As the Court has made plain in many cases, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). In the circumstances at issue here, respondents do not fit either category. They merely applied the department policy in effect at the time, which was later revised to conform to the subsequent holding of the District Court in the *Ayeni* case, after it had disapproved of similar conduct by law enforcement officers. *See* J.A. 66-75. To deny them qualified immunity in these circumstances would be to subvert the close and careful discipline and adherence to authority that is essential to sound law enforcement.

## II. THIS CASE IS DISTINGUISHABLE FROM THE CIRCUIT CASES CITED BY PETITIONERS AND ACCORDS WITH THE COURT'S PRECEDENTS.

Petitioners correctly note that the circuit courts of appeals appear to disagree about whether law enforcement officers violate clearly established law by allowing members of the news media to accompany them and to observe, record, and report on their conduct as they properly execute a valid warrant on private property. *See* Pet. 8-14 (discussing cases). This case, however, presents an inappropriate vehicle for exploring and resolving that circuit split. As noted, these officers were acting in accordance with the binding terms of an apparently valid Justice Department policy that had never been challenged in court. They simply were not at liberty to depart from that policy or to refuse to implement its terms. It would thus be beyond the pale to find that they were not acting in good faith

or that they were disregarding clearly established law. These circumstances are materially different from the other cases cited by petitioners, in which law enforcement officers made their own determinations about how to proceed in executing a warrant with media personnel in attendance.

In addition, the federal and state officers' actions here -- and the policy that they followed -- were in harmony with all extant court decisions on this subject in April of 1992. At that time, three courts had considered and rejected constitutional challenges to the conduct at issue in this case. *See Moncrief v. Hanton*, 10 Med. L. Rptr. 1620 (N.D. Ohio 1984); *Higbee v. Times-Advocate, Inc.*, 5 Med. L. Rptr. 2372 (S.D. Cal. 1980); *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. Ct. App. 1980). The Court has repeatedly instructed that when government officers are sued for money damages in their individual capacities, they are protected by the doctrine of qualified immunity unless the unconstitutionality of their conduct would have been patently obvious to any reasonable person "in the light of pre-existing law." *Anderson*, 483 U.S. at 640; *Harlow*, 457 U.S. at 818.

The decision below is fully in accord with the Court's precedents on qualified immunity. In particular, in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), the Court upheld a claim of qualified immunity for public officials who engaged in wiretapping because the law was not "clearly established" at the time that such conduct was illegal. The Court based this holding on two unpublished federal district court decisions which had previously concluded that such conduct was not improper. *Id.* at 533-34 (citing *United States v. Dellinger*, No. 69 CR 180 (N.D. Ill. Feb. 20, 1970), *rev'd*, 472 F.2d 340 (7th Cir. 1972), and *United States v. O'Neal*, No. KC-CR-1204 (D. Kan. Sept. 1, 1970), *app. dismissed*, 453 F.2d 344 (10th Cir. 1972). The Court pointedly noted that its conclusion on qualified immunity was not affected by its own subsequent holding that the same conduct had violated the Fourth Amendment. *See Mitchell*, 472 U.S. at 535.

Disregarding the consistent tenor of the Court's qualified immunity cases, petitioners have repeatedly tried to persuade



the courts to judge their position under the light cast by subsequent decisions, including *Ayeni* and other more recent rulings. "Such hindsight-based reasoning on immunity issues is precisely what *Harlow* rejected." *Mitchell*, 472 U.S. at 535. In *Ayeni*, in particular, a federal district court ruled for the first time that similar conduct violated the Fourth Amendment, but that ruling did not even come down until almost two years after the events occurred in this case. *See Ayeni v. CBS, Inc.*, 848 F. Supp. 362 (E.D.N.Y.), *aff'd sub nom. Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995). The response to that decision was pertinent and virtually immediate: the Justice Department amended the policy to eliminate the "media ride-along" component. *See* J.A. 65-75. That global response -- rather than asking a court retrospectively to impose personal liability upon individual officers to pay money damages -- was the most appropriate reaction to such a ruling.

Petitioners further contend that the decision below violates the Court's settled precedents interpreting the Fourth Amendment. *See* Pet. 14-19. In fact, the Fourth Circuit did not directly resolve this issue, stressing that "we do not address whether the officers' conduct was constitutional or appropriate, only whether the legal landscape when these events occurred was sufficiently developed that it would have been obvious to reasonable officers that the actions at issue were violative of the Fourth Amendment." Pet. App. 17a. A few points about petitioners' discussion, moreover, reveals that it operates at an impermissible level of generality in addressing issues of qualified immunity, a level of generality that elides some of the more difficult questions which reveal that the law is not clearly established in this area. *See, e.g., Bills v. Aseltine*, 52 F.3d 596, 602 (6th Cir. 1995) (criticizing the Second Circuit's ruling in the *Ayeni* case for having failed "to define narrowly the right allegedly violated, instead describing the violation in abstract and general terms").

Petitioners quote the Court's statement that the Fourth Amendment confines an executing officer strictly within the bounds set by the warrant. Pet. 14-15 (quoting *Bivens*, 403 U.S. at 394 n.7). Yet there is no dispute in this case, at least at this

juncture, that the officers executed the arrest warrant for Dominic Wilson properly and that the warrant was valid. The issue instead is whether the media's accompaniment, which led only to the reporters observing and recording information that was already in the plain view of the officers, constitutes an independent violation of the Fourth Amendment. On this point, it is pertinent to note that the "plain view" doctrine is itself a recognized exception to the warrant requirement. *See Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

Moreover, when petitioners attempt to argue that the reporters "seized" such intangible items as "news, information, [or] photographic images," Pet. 15, their argument again rests on very uncertain ground, rather than on any clearly established law. In *Arizona v. Hicks*, 480 U.S. 321, 324 (1987), the Court held that law enforcement officers recording the serial numbers on equipment "did not meaningfully interfere with [the owner's] possessory interest in either the serial numbers or the equipment, and therefore did not amount to a seizure." For this reason, the Fourth Circuit panel had noted that "[a]lthough an application of this definition indicates that the photographic images captured by the reporters were not seized within the meaning of the Fourth Amendment, we need not decide this issue because, at a minimum, it was not clearly established that it was." Pet. App. 63a n.5. That conclusion is sufficient to uphold respondents' defense of qualified immunity.

Petitioners' discussion also leads into an unilluminating quarrel over whether "the media's presence contributed to accurate reporting of law enforcement activities which in turn helps deter crime and police misconduct." Pet. 17. Although reasonable people could certainly disagree on this point, the Fourth Circuit majority correctly noted that "the media ride-along policy pursuant to which the reporters accompanied the officers indicated that keeping the public informed of the activities of the Marshals Service was a duty of that agency and that media ride-alongs advanced that interest." Pet. App. 15a; *see* J.A. 61 (describing and endorsing this function of media ride-alongs). Respondents, who were subordinates in the chain of command, were acting in good faith and did not violate



clearly established law when they complied with the reasonable and apparently valid terms of this policy in April of 1992.

Finally, petitioners misstate the opinion below when they claim that it required too great a level of specificity to overcome the defense of qualified immunity. The Fourth Circuit did *not* say that though the Court's constitutional rule may have been clear as a general matter, it had not yet been elaborated with enough factual specificity. *See* Pet. 19-20 (quoting Pet. App. 10a). Instead, the Fourth Circuit said that even if it were to agree that the Court's constitutional rule were clear as a general matter (which it did not accept), it was not obvious that respondents' conduct actually fell within the ambit of that rule. In particular, the court held that it would have been reasonable for respondents to conclude that permitting media representatives to observe and record the execution of an arrest warrant does serve a legitimate law enforcement purpose, such as by "facilitating accurate reporting that improves public oversight of law-enforcement activities." Pet. App. 10a.

Indeed, as noted above, the court later emphasized that "the media ride-along policy pursuant to which the reporters accompanied the officers indicated that keeping the public informed of the activities of the Marshals Service was a duty of that agency and that media ride-alongs advanced that interest." Pet. App. 15a.[2] Here again, therefore, the circumstances of this case strongly support respondents' defense of qualified immunity under the Court's consistent precedents headed by *Harlow*, *Mitchell*, and *Anderson*. Only by faithful application of this settled doctrine can law enforcement officers "reasonably anticipate when their conduct may give rise to liability for damages." *Davis v. Scherer*, 468 U.S. 183, 195 (1984); *see also Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974) (public officials must be permitted to fulfill their

---

[2] Petitioners note that the court's earlier statements on this point (Pet. App. 10a) were not joined by a majority of the judges on the *en banc* panel, *see* Pet. 6 n.3 (citing Pet. App. 17a (Widener, J., concurring)), but the court's later statements on this point (Pet. App. 15a) were joined by a majority of the judges on the panel.

responsibilities under controlling law with "the decisiveness and the judgment required by the public good").

## CONCLUSION

For the foregoing reasons, respondents respectfully request that the petition for a writ of *certiorari* be denied in this case.

Respectfully submitted,

STUART M. NATHAN
JOHN B. HOWARD
Office of the Attorney General
of Maryland
200 St. Paul Place, 2d Floor
Baltimore, Maryland 21202
(410) 764-4070

RICHARD A. CORDRAY
*Counsel of Record*
JAMES A. ANZELMO
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

*Attorneys for Respondents*

October 1998

No. 98-83

In The

# Supreme Court of the United States

October Term, 1998

CHARLES WILSON, GERALDINE WILSON and RACHEL SNOWDEN, next friend/mother of VALENCIA SNOWDEN, a minor,

*Petitioners,*

*vs.*

HARRY LAYNE, JAMES A. OLIVO, JOSEPH L. PERKINS, MARK A. COLLINS, ERIC E. RUNION and BRIAN E. ROYNESTAD,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit*

## REPLY BRIEF FOR PETITIONERS

RICHARD K. WILLARD
*Counsel of Record*
DAVID H. COBURN
JAMES S. FELT
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 429-3000

RICHARD SELIGMAN
601 Indiana Avenue, Suite 910
Washington, DC 20004
(202) 745-7800

*Attorneys for Petitioners*

*Of Counsel:*

ARTHUR B. SPITZER
AMERICAN CIVIL LIBERTIES UNION of the National Capital Area
1400 20th Street, N.W.
Washington, DC 20036
(202) 457-0800

149130

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

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Respondents concede the existence of a circuit conflict, but in an effort to convince the Court not to grant this petition, they advance a factually untrue and legally immaterial argument that was neither relied upon or addressed by the courts below.

**I.**

Respondents claim that "[t]he most important fact about this case . . . is that respondents were following the terms of a binding and apparently valid policy issued by the U.S. Department of Justice," opp'n at 4, and "simply were not at liberty to depart from that policy or to refuse to implement its terms." Opp'n at 7. This claim is precisely contrary to Respondents' own sworn testimony:

> · "I don't know of any authority anywhere about press." J.A. 132. (Deposition of Joseph L. Perkins taken Apr. 25, 1995, at 59.)
>
> · "I'm not familiar with the policy with the press." J.A. 119. (Deposition of Mark A. Collins taken Apr. 24, 1995, at 157.)
>
> · Q. "Did you inquire or was there any discussion with Harry Layne, when he instructed you to take the media along with you, whether or not the media would be allowed to go into private residences?" A. "There was no instruction." J.A. 131. (Perkins Dep. at 54.)

The uncontroverted evidence in the record establishes beyond any doubt that Respondents were never aware of the "policy" that they now claim to have been following. In addition, there is no evidence in the record that anybody ever instructed or authorized Respondents — either pursuant to a policy or otherwise — to take the media with them into private dwellings without consent.[1]

1. Again, the record evidence indicates just the opposite. Three of the six Respondents in this case are Montgomery County deputy sheriffs. The Sheriff of Montgomery County, Raymond Kight, testified under oath that it was the policy of the Montgomery County Sheriff's Department to never let civilians who were not providing law enforcement assistance into private homes: "We would never let a civilian into a home or anywhere else where we have a person that – that's in custody. . . . That's just not allowed." (Cont'd)

Although Respondents' sworn testimony is damning enough, their "just following a policy" claim is also undermined by the actual language of the document that they call a "Justice Department policy." To begin with, by its very terms, the document is not a "policy" at all. It refers to itself simply as a "booklet" that has "attempted to address some of the basics of media ride-alongs." App. 5a.[2] The final paragraph of the booklet advises marshals to call the "Office of Congressional and Public Affairs" with any media ride-along questions not addressed and concludes: "We will make every effort to help you plan for a most successful ride-along." App. 6a. This document, trumpeted as a "binding Justice Department policy" that Respondents "simply were not at liberty" to disobey, is nothing more than a media relations guide prepared by the Office of Congressional and Public Affairs.

The existence of this media ride-along booklet, moreover, is really beside the point. Petitioners have no quarrel with "media ride-alongs" or with an informational booklet providing suggestions on how to conduct them. Petitioners' sole complaint — and the sole issue raised by the question presented here — is with officers bringing the media inside private residences without the occupants' consent. The media ride-along booklet nowhere authorizes or instructs deputy marshals to do this. The only language in the booklet upon which Respondents rely to justify their conduct in this case is this sentence: "If the arrest is planned to take place inside a house or building, agree ahead of time on when the camera can enter and who will give the signal." App. 2a; opp'n at 3. This lone reference hardly amounts to a binding

(Cont'd)
J.A. 147. Sheriff Kight also testified that his deputies knew better than to allow civilians participating in ride-alongs inside people's homes: "My deputies knew not to do that. And I would believe that the homeowner, if that happened, you know, would have some measure of grievance that that occurred." J.A. 148.

2. For the Court's convenience, the booklet is included as an appendix to this reply. Although the booklet appears to be missing every other page, for reasons unknown to Petitioners, this is the only form in which Respondents placed it in the record below.



order to respondents to take the press with them into a home without the occupants' consent and is perfectly consistent with Petitioners' view that no members of the media should have been allowed to enter Petitioners' home until they had received "the signal" that Petitioners had indeed provided that consent.

Respondents also neglect to point out language in the booklet that undercuts their argument that they were somehow authorized or instructed to do what they did here. For example, the booklet describes as "essential" the establishment of ground rules and advises deputy marshals to convey those ground rules to reporters. App. 2a. Two ground rules that the booklet specifically identifies are those addressing "what can be covered with cameras and when" and "any privacy restrictions that may be encountered." App. 2a.

These facts explain why the courts below never addressed this argument or relied upon it as a basis for their decisions. It is simply not an issue here.

## II.

Although the "just following a policy" argument is factually untrue, it is also immaterial. The argument merely begs the question whether Respondents violated clearly established law when they brought the media into Petitioners' home without consent. Petitioners cannot win this case unless the Court is convinced that taking the media into a private dwelling without the occupants' consent violated clearly established law of which a reasonable officer in April 1992 would have been aware. Case law is uniform in finding that a policy, order, statute or regulation directing a government official to engage in clearly unlawful conduct is no shield to liability. *See, e.g.*, *Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994) ("[I]ndividuals cannot always be held immune for the results of their official conduct simply because they were enforcing policy or orders. . . . Where a statute authorizes official conduct which is patently violative of fundamental constitutional principles, an officer who enforces that statute is not entitled to qualified immunity."); *J.H.H. v. O'Hara*, 878 F.2d 240, 245 n.4 (8th Cir. 1989) ("An official's actions are not immunized because they were taken according to orders or

regulations if the defendant still knew or should have known he was violating plaintiff's constitutional rights"); *Forsyth v. Kleindienst*, 599 F.2d 1203, 1217 (3rd Cir. 1979) ("if [FBI agents] knew or should have known that their actions were violating the plaintiff's constitutional rights, then they will not be allowed to hide behind the cloak of institutional loyalty" by claiming they were simply following orders). The cases cited by Respondents in their Brief in Opposition at 5 and 6 do not say otherwise. Those cases merely stand for the proposition that an officer following an unconstitutional policy is entitled to qualified immunity so long as the policy being followed is not so *clearly* unconstitutional that a reasonable officer would have known it was unconstitutional.

## III.

Notwithstanding Respondents' efforts to convince the Court otherwise, this case addresses the issue of qualified immunity in a typical factual situation that has recurred and continues to recur frequently. This case, accordingly, presents a proper vehicle for resolving the conflict in the circuits and ensuring uniformity in the decisions of lower courts as they continue to be presented with cases like this one. As in so many other recent cases, law enforcement officials in this case brought representatives of the media with them into a private dwelling without the occupants' consent.[3] The one notable exception to this typical factual situation

3. The cases identified in the Petition that also involved law enforcement officials bringing the media with them into a private dwelling without the occupants' consent are: *Parker v. Boyer*, 93 F.3d 445, 447 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997); *Stack v. Killian*, 96 F.3d 159 (6th Cir. 1996); *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995); *Hagler v. Philadelphia Newspapers, Inc.*, C.A. No. 96-2154, 1996 WL 408605 (E.D. Pa. July 12, 1996); *Moncrief v. Hanton*, 10 Med. L. Rptr. 1620 (N.D. Ohio Jan. 6, 1984); *Higbee v. Times-Advocate*, 5 Med. L. Rptr. 2372 (S.D. Cal. Jan. 9, 1980); *Prahl v. Brosamle*, 295 N.W. 2d 768 (Wis. Ct. App. 1980); *see also Reeves v. Fox Television Network*, 983 F. Supp. 703 (N.D. Ohio 1997) (occupant of home sued production company of the television show *COPS* for invasion of privacy caused by television camera crew recording encounter with police inside his home); Minerva Canto, *Baseball All-Star's Widow Suing L.A.*, L.A. Daily (Cont'd)



is presented by *Berger v. Hanlon*, 129 F.3d 505 (9th Cir. 1997), *petitions for cert. filed*, 66 U.S.L.W. 3783 (May 26, 1998) (97-1914 and 97-1927), a case currently pending before the Court. In *Berger*, the media never entered the Bergers' home.[4]

In the three months since this petition was filed, decisions in two more factually indistinguishable cases have been published. In each of those cases the court found law enforcement officials liable for bringing the media into private buildings without the occupants' consent, even though, at the time of the underlying events, no court had ever found such conduct to be unconstitutional. *See Swate v. Taylor*, No. CIV.A. H-94-727, 1998 WL 639314 (S.D. Tex. Aug. 28, 1998) (DEA agent accompanied by television crew from *60 Minutes* in Spring of 1992, and who was following direct orders, not entitled to qualified immunity for search of privately-owned methadone clinic); *Barrett v. Outlet Broadcasting, Inc.*, No. Civ.A. C-2-94-074, 1997 WL 909475 (S.D. Ohio Sept. 18, 1997) (police officers acting pursuant to a media ride-along policy and who were following direct orders on January 27, 1993 not entitled to qualified immunity when they permitted a local television news crew to accompany them into a private home in response to a 9-1-1 call). The publication of *Swate* and *Barrett* during the short period between the filing of the petition and this reply further underscores how this case presents an important and timely question that merits plenary consideration.

## CONCLUSION

For the reasons set forth above and in the petition, this case presents an appropriate vehicle for resolving the conflict in the circuits. The petition for a writ of certiorari should be granted.

(Cont'd)
News, Oct. 10, 1997, *available in* 1997 WL 4055786 (Widow of baseball great Curt Flood sued city, police officers and production company of reality-based show *Placas* for raiding her home during a party "to provide the reality-based show *Placas* with 'exciting footage' ").

4. Counsel of Record for Respondents here serves as counsel of record for the law enforcement petitioners in *Berger*.

Respectfully submitted,

RICHARD K. WILLARD
*Counsel of Record*
DAVID H. COBURN
JAMES S. FELT
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 429-3000

RICHARD SELIGMAN
601 Indiana Avenue, Suite 910
Washington, DC 20004
(202) 745-7800

*Attorneys for Petitioners*

*Of Counsel:*

ARTHUR B. SPITZER
AMERICAN CIVIL LIBERTIES
UNION of the National
Capital Area
1400 20th Street, N.W.
Washington, DC 20036
(202) 457-0800

# APPENDIX

## APPENDIX A — UNITED STATES MARSHALS SERVICE MEDIA RIDE-ALONG BOOKLET

**U.S. Department of Justice**

**UNITED STATES MARSHALS SERVICE**

**[SEAL OF UNITED STATES MARSHALS SERVICE]**

**MEDIA RIDE-ALONGS**

The U.S. Marshals Service, like all federal agencies, ultimately serves the needs and interests of the American public when it accomplishes its designated duties. Keeping the public adequately informed of what the Service does can be viewed as a duty in its own right, and we depend on the news media to accomplish that.

Media "ride-alongs" are one effective method to promote an accurate picture of Deputy Marshals at work. Ride-alongs, as the name implies, are simply opportunities for reporters and camera crews to go along with Deputies on operational missions so they can see, and record, what actually happens. The result is usually a very graphic and dynamic look at the operational activities at the Marshals Service, which is subsequently aired on TV or printed in a newspaper, magazine, or book.

However, successful ride-alongs don't just "happen" in a spontaneous fashion. They require careful planning and attention to detail to ensure that all goes smoothly and that the media receive an accurate picture of how the Marshals Service operates. This booklet describes considerations that are important in nearly every ride-along.

Initially, it's important to realize that not every operational situation lends itself to a ride-along. Some may simply be too

dangerous or sensitive to have media involved — the risk may outweigh the possible benefits. That may be true in some fugitive apprehension cases, which normally offer the best possibilities for ride-alongs. In other instances, there just won't be the film or photo opportunities the media desire (e.g. solid action sequences) to make the trip worth it. That could hold true for some asset seizures or prisoner transports.

So, we must initially decide whether you have an event that could support a ride-along, realizing that reporters are generally looking for action stories, human interest angles, or unusual

. . . .

security or other concerns prohibit the release of much information, you probably have a poor ride-along situation to begin with.

**Establish Ground Rules**

Another good idea — actually, it's an essential one — is to establish ground rules at the start and convey them to the reporter and camera person. Address such things as what can be covered with cameras and when, any privacy restrictions that may be encountered, and interview guidelines.

Emphasize the need for safety considerations and explain any dangers that might be involved. Make the ground rules realistic but balanced — remember, the media will want good action footage, not just a mop-up scene. If the arrest is planned to take place inside a house or building, agree ahead of time on when the camera can enter and who will give the signal.



If you want liability waivers signed, make sure reporters know this ahead of time and that they sign these statements before the ride-along begins. Retain the signed waivers in your files. For your reference, a sample liability waiver is included as an appendix to this booklet.

**Agreeing to an Embargo**

If a news embargo is part of the ground rules, discuss this aspect at the time the initial invitation is extended to a reporter. A news embargo simply means that the reporter agrees not to release the story generated by the ride-along until an agreed upon date. For instance, the ride-along may take place within the context of a large-scale fugitive operation you have underway. In that case, you will likely not want any publicity about the operation until its conclusion.

Remember that you will have to clearly define for the reporter the exact nature of the news embargo. Does it apply only to references about the operation? Or is it meant to prohibit the early release of any and all in formation obtained before and during the ride-along?

And if you arrest a high profile fugitive during a ride-along, other news media may hear of it and break the news. Once that happens, the reporter you've worked with will certainly feel the embargo no longer applies, at least as far as that particular arrest is concerned. Discuss ahead of time just what could be released in that situation, such as information about the arrest but no mention of the on-going operation.

Finally, to avoid nasty surprises, make sure both the reporter and his or her editor agree to the embargo. If they don't,

. . . .

Deputies who would be extremely uncomfortable in a media role should not be forced into it. Look instead for those who are particularly articulate for the Service. If they've had prior experience with reporters or news organizations, they are even more valuable.

**Coping with "Dry Holes"**

What if all goes well in the ride-along except for one thing — you don't achieve the intended objective? The fugitive isn't apprehended or the property can't be seized. It's one of those occasional "dry holes" that happen, but this time a reporter is present to see the failure.

That's a chance you always take in a ride-along, but it doesn't have to be a media failure. The reporter can still see how you operate. He or she can still get a feeling for what Deputy Marshals do and how they do it, as well getting some background footage and story details.

A "dry hole" experience can be used, for instance, to emphasize just how tough a job it is to pursue and apprehend fugitives. Even after days and weeks of substantial investigation, things might not fall perfectly into place. Use the experience to emphasize the many difficulties law enforcement officers face.

In the best circumstances, a "dry hole" will later be followed up by a successful apprehension or seizure at which the media are again present. So it pays to stay in touch with the ride-along media crew. Arrange for them to be ready on very



short notice if you do locate the fugitive you are pursuing, or if another good ride-along opportunity presents itself. That's why getting their pager numbers and home phone numbers is important. Have your logistics plan in place should a spontaneous, ride-along situation present itself. If a reporter is not available, the editor or producer may want to send a camera person along to record the "action," and have a reporter follow up on the story later.

**It's Never Over Until It's Over**

Whether the ride-along was successful (resulting in an apprehension, seizure, etc.) or not, reporters may have follow-up questions or need information. The matter doesn't necessarily end when you drop the reporter off at the conclusion of the ride-along. Be prepared to fulfill other information requests related to the case. You may not be able to give them all they need, because of security, privacy, or other considerations, but help them out to the extent you can.

Remember, it's better to help them get accurate facts. Otherwise, the wrong information may just get spread all over the newspapers and across TV screens, leading to more phone calls and other queries than you will want to deal with

. . . .

This booklet has attempted to address some of the basics of media ride-alongs. The scope is not all-inclusive. It was not intended to cover every situation that arises or every detail that you must consider. Simply put, there are situations that will be unique to each District, and reporters whose requirements will vary from city to city.

*Appendix A*

However, if you have other questions concerning ride-alongs that haven't been covered, or you would like advice about a particular media situation, please feel free to contact the Office of Congressional and Public Affairs. The phone numbers are 367-9065 (FTS) or 202-307-9065 (Commercial). We will make every effort to help you plan for a most successful ride-along.

No. 98-83

In The

# Supreme Court of the United States

October Term, 1998

CHARLES WILSON, GERALDINE WILSON and RACHEL SNOWDEN, next friend/mother of VALENCIA SNOWDEN, a minor,

*Petitioners,*

vs.

HARRY LAYNE, JAMES A. OLIVO, JOSEPH L. PERKINS, MARK A. COLLINS, ERIC E. RUNION and BRIAN E. ROYNESTAD,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

## JOINT APPENDIX

RICHARD A. CORDRAY
*Counsel of Record*
JAMES A. ANZELMO
4900 Grove City Road
Grove City, OH 43123
(614) 539-1661

*Attorneys for Respondents Harry Layne, James A. Olivo, and Joseph L. Perkins*

RICHARD K. WILLARD
*Counsel of Record*
DAVID H. COBURN
JAMES S. FELT
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 429-3000

*Attorneys for Petitioners*

(Additional Counsel On Inside Cover)

**Petition For Certiorari Filed July 7, 1998**
**Certiorari Granted November 9, 1998**

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

J. Joseph Curran, Jr.
Attorney General of
Maryland

Carmen M. Shepard
Deputy Attorney General

Lawrence P. Fletcher-Hill
*Counsel of Record*
Andrew H. Baida
John B. Howard, Jr.
Assistant Attorneys
General
200 St. Paul Place,
20th Floor
Baltimore, Maryland 21202
(410) 576-6345

*Attorneys for Respondents*
*Mark A. Collins, Eric E.*
*Runion, and Brian E.*
*Roynestad*

Richard Seligman
601 Indiana Avenue,
Suite 910
Washington, DC 20004
(202) 745-7800

*Of Counsel:*

Steven R. Shapiro
American Civil Liberties
Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500

Arthur B. Spitzer
American Civil Liberties
Union of the National
Capital Area
1400 20th Street, N.W.
Washington, DC 20036
(202) 457-0800

Dwight H. Sullivan
American Civil Liberties
Union of Maryland
2219 St. Paul Street
Baltimore, MD 21218
(410) 889-8555

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District of Maryland (Greenbelt)

* * *

| | | |
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| 8/24/95 | 41 | SECOND AMENDED COMPLAINT by Charles H. Wilson, Geraldine E. Wilson, Raquel Wilson, (Answer due 9/3/95 for United States) amending [1-1] complaint (c/s) (sls) [Entry date 08/28/95] |
| 9/25/95 | 42 | MOTION by defendants, Eric E. Runion, Mark A. Collins and Brian E. Roynestad for Summary Judgment and attachment (c/s) (sls) [Entry date 09/26/95] |
| 9/27/95 | 43 | MOTION with memorandum in support by Federal defendants, Joseph L. Perkins, Harry Layne and James A. Olivio for Summary Judgment and Exhibits A thru H-Filed Separately (c/s) (sls) [Entry date 09/28/95] [Edit date 09/28/95] |
| 9/27/95 | 44 | MOTION with memorandum in support by defendant, United States for Partial Summary Judgment and Exhibits A thru H-Filed Separately (c/s) (sls) [Entry date 09/28/95] [Edit date 09/28/95] |

* * *

| | | |
|---|---|---|
| 11/1/95 | 49 | CROSS-MOTION by plaintiffs, Charles H. Wilson, Geraldine E. Wilson and Raquel Wilson for Partial Summary Judgment (c/s) (sls) [Entry date 11/02/95] |
| 11/1/95 | 50 | RESPONSE by plaintiffs, Charles H. Wilson, Geraldine E. Wilson and Raquel Wilson in opposition to [44-1, 43-1, 42-1] motions of defendants for Summary |

Judgment and Exhibits 1 thru 5-Filed Separately (c/s) Judgment, [42-1] motion for Summary Judgment (sls) [Entry date 11/02/95]

11/1/95 50 MEMORANDUM by plaintiffs, Charles H. Wilson, Geraldine E. Wilson and Raquel Wilson in support of [49-1] motion of plaintiffs for Partial Summary Judgment and Exhibits 1 thru 5-Filed Separately (c/s) (sls) [Entry date 11/02/95]

* * *

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12/4/95 – ORAL ORDER "GRANTING" in part, "DENYING" in part [42-1] motion of defendants, Eric Runion, Mark Collins and Brian R. for Summary Judgment, [43-1] motion of federal defendants, Joseph Perkins, Harry Layne and James Olivio for Summary Judgment and [44-1] motion of United States for Partial Summary Judgment (by Judge Peter J. Messitte) (sls) [Entry date 12/07/95]

12/8/95 57 ORDER "GRANTING" in part with regard to Count I and Count of the Second Amended Complaint and "DENYING" in part with regard to Count III of the Second Amended Complaint, to the Defendants' Motions for Summary Judgment (signed by Judge Peter J. Messitte 12/4/95) (c/m 12/7/95-kcd) (sls)

2/1/96 58 NOTICE OF APPEAL by Harry Layne, Joseph L. Perkins, James A. Olivio – Fee Status: not required Appeal record due on 3/2/96 (c/s 2/5/96 ps) (jk) [Entry date 02/09/96] [Edit date 02/09/96]

2/1/96 59 NOTICE OF APPEAL by Eric E. Runion, Mark A. Collins, Brian E. Roynestad and Exhibit 1. Fee Status: filing fee paid Appeal record due on 3/2/96 (c/s 2/2/96 akc) (jk) [Entry date 02/09/96]

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**U.S. Department of Justice**

**United States**
**Marshals Service** **(LOGO)**

## MEDIA RIDE-ALONGS

The U.S. Marshals Service, like all federal agencies, ultimately serves the needs and interests of the American public when it accomplishes its designated duties. Keeping the public adequately informed of what the Service does can be viewed as a duty in its own right, and we depend on the news media to accomplish that.

Media "ride-alongs" are one effective method to promote an accurate picture of Deputy Marshals at work. Ride-alongs, as the name implies, are simply opportunities for reporters and camera crews to go along with Deputies on operational missions so they can see, and record, what actually happens. The result is usually a very graphic and dynamic look at the operational activities of the Marshals Service, which is subsequently aired on TV or printed in a newspaper, magazine, or book.

However, successful ride-alongs don't just "happen" in a spontaneous fashion. They require careful planning and attention to detail to ensure that all goes smoothly and that the media receive an accurate picture of how the Marshals Service operates. This booklet describes considerations that are important in nearly every ride-along.

Initially, it's important to realize that not every operational situation lends itself to a ride-along. Some may simply be too dangerous or sensitive to have media involved-the risk may outweigh the possible benefits. That may be true in some fugitive apprehension cases,



which normally offer the best possibilities for ride-alongs. In other instances, there just won't be the film or photo opportunities the media desire (e.g. solid action sequences) to make the trip worth it. That could hold true for some asset seizures or prisoner transports.

So, we must initially decide whether you have an event that could support a ride-along, realizing that reporters are generally looking for action stories, human interest angles, or unusual storylines. Is it an event you want to publicize, and is it an interesting or important case?

### Planning May "Save the Day"

Once you've made the determination that a ride-along is appropriate and desirable, the next step is planning for it. There are a number of important considerations that must be addressed early on if you want the ride-along to be successful. Among those considerations are:

- What media representative(s) will you invite to ride along (and who will you offend if you do not offer a similar invitation)?
- Who will be responsible for accompanying and briefing the media about the case?
- What information on the case/event can you give them without compromising security or investigative methods?
- What are the ride-along ground rules you need to establish for the media?
- Are there any particular logistical problems that may need to be worked out for the ride-along?

• What coordination is needed with other agencies such as local, state or other federal agencies who might be involved in the ride-along case?

### Who to Invite?

Determining who to invite on the ride-along is an important first step. Don't bite off more than you can chew. Start with a local reporter you know and trust, someone you feel comfortable dealing with. Recommendations from other local law enforcement agencies who've worked with the media might be considered.

Reporters are highly competitive with each other so avoid inviting more than one media organization to the same ride-along. Arrange for just one at a time or else you may be caught in the middle between competing TV stations or newspapers. Media pools – having two or three people go along to represent all the interested media and then share the results – may work well for major news events, but not for ride-alongs.

For those you do invite, remember that information is the lifeblood of journalism. Be prepared to relate background on the case, details about fugitives or seized property, and other related facts such as original charges. Comprehensive information is needed, not simply thumbnail sketches with very few details.

In the planning stage, determine what you can release and when you can release it. Reporters need to be briefed on basic facts before the ride-along begins, and on the specifics as they become available. Handing them a written report or fact sheet at the beginning is a good idea. If



security or other concerns prohibit the release of much information, you probably have a poor ride-along situation to begin with.

### Establish Ground Rules

Another good idea – actually, it's an essential one – is to establish ground rules at the start and convey them to the reporter and camera person. Address such things as what can be covered with cameras and when, any privacy restrictions that may be encountered, and interview guidelines.

Emphasize the need for safety considerations and explain any dangers that might be involved. Make the ground rules realistic but balanced – remember, the media will want good action footage, not just a mop-up scene. If the arrest is planned to take place inside a house or building, agree ahead of time on when the camera can enter and who will give the signal.

If you want liability waivers signed, make sure reporters know this ahead of time and that they sign these statements before the ride-along begins. Retain the signed waivers in your files. For your reference, a sample liability waiver is included as an appendix to this booklet.

### Agreeing to an Embargo

If a news embargo is part of the ground rules, discuss this aspect at the time the initial invitation is extended to a reporter. A news embargo simply means that the reporter agrees not to release the story generated by the ride-along until an agreed upon date. For instance, the ride-

along may take place within the context of a large-scale fugitive operation you have underway. In that case, you will likely not want any publicity about the operation until its conclusion.

Remember that you will have to clearly define for the reporter the exact nature of the news embargo. Does it apply only to references about the operation? Or is it meant to prohibit the early release of any and all information obtained before and during the ride-along?

And if you arrest a high profile fugitive during a ride-along, other news media may hear of it and break the news. Once that happens, the reporter you've worked with will certainly feel the embargo no longer applies, at least as far as that particular arrest is concerned. Discuss ahead of time just what could be released in that situation, such as information about the arrest but no mention of the on-going operation.

Finally, to avoid nasty surprises, make sure both the reporter and his or her editor agree to the embargo. If they don't, or won't, consider inviting another media organization. Make sure an agreed-to embargo is in place before discussing any substantial facts of the operation and ride-along.

### Getting the Signals Straight

The logistics involved can sometimes prove tricky, so plan carefully before the ride-along takes place. The planning should include such details as where you will meet the reporter to begin the ride-along, what transportation will be used to and from the scene, how you can make



immediate contact if a ride-along opportunity develops unexpectedly (i.e. get home and pager phone numbers). In urban areas, store and shopping center parking lots are often good places to meet reporters.

If space is tight inside the arrest team's vehicle, the camera person can ride with the arrest team and the reporter with the Deputy who is going along as the media escort. You'll need a second car anyway to return the reporter and camera person to their vehicle after the arrest.

Okay, you've done all the planning you can think of – and you're ready to execute and the media are ready to ride. Does that mean success is an automatic follow-on? Not by a long shot. The execution phase is where everything comes together, including the actions and demeanor of the Deputies who are taking part.

The very best planning won't result in a good ride-along if the Marshals Service personnel involved do not do their part. It's a case of actions speaking as loudly as words, and both are important in getting the best media exposure possible.

### "Waving the Flag"

One action of special consequence is "waving the flag" of the Marshals Service. This is accomplished when Deputies can easily be recognized as USMS Deputies because they are wearing raid jackets, prominently displaying their badges, or exhibiting other easily identifiable marks of the Service. We want the public to know who you are and what kind of job you do. That is one of the goals of

the ride-along. So having Deputy Marshals easily identified as such on camera is not just a whim – it's important to the overall success of the ride-along.

Of course, how the Deputies act and what they say is also crucial. During the ride-along virtually any statement made by Deputies just might end up as a quote, attributed to the person who made it. Sometimes that could prove embarrassing. A Deputy must try to visualize what his or her words will look like in a newspaper or sound like on TV. Being pleasant and professional at all times is key, and that includes not being drawn into statements of personal opinion or inappropriate comments. Using common sense is the rule.

Deputies who would be extremely uncomfortable in a media role should not be forced into it. Look instead for those who are particularly articulate and who would be good spokespersons for the Service. If they've had prior experience with reporters or news organizations, they are even more valuable.

**Coping with "Dry Holes"**

What if all goes well in the ride-along except for one thing – you don't achieve the intended objective? The fugitive isn't apprehended or the property can't be seized. It's one of those occasional "dry holes" that happen, but this time a reporter is present to see the failure.

That's a chance you always take in a ride-along, but it doesn't have to be a media failure. The reporter can still see how you operate. He or she can still get a feeling for



what Deputy Marshals do and how they do it, as well getting some background footage and story details.

A "dry hole" experience can be used, for instance, to emphasize just how tough a job it is to pursue and apprehend fugitives. Even after days and weeks of substantial investigation, things might not fall perfectly into place. Use the experience to emphasize the many difficulties law enforcement officers face.

In the best circumstances, a "dry hole" will later be followed up by a successful apprehension or seizure at which the media are again present. So it pays to stay in touch with the ride-along media crew. Arrange for them to be ready on very short notice if you do locate the fugitive you are pursuing, or if another good ride-along opportunity presents itself. That's why getting their pager numbers and home phone numbers is important. Have your logistics plan in place should a spontaneous ride-along situation present itself. If a reporter is not available, the editor or producer may want to send a camera person along to record the "action," and have a reporter follow up on the story later.

**It's Never Over Until It's Over**

Whether the ride-along was successful (resulting in an apprehension, seizure, etc.) or not, reporters may have follow-up questions or need information. The matter doesn't necessarily end when you drop the reporter off at the conclusion of the ride-along. Be prepared to fulfill other information requests related to the case. You may

not be able to give them all they need, because of security, privacy, or other considerations, but help them out to the extent you can.

Remember, it's better to help them get accurate facts. Otherwise, the wrong information may just get spread all over the newspapers and across TV screens, leading to more phone calls and other queries than you will want to deal with.

You also need to find out when the coverage will air or end up in print. Ask the reporter if he or she can keep you informed on that matter. You might "grease the skids" for this by offering the reporter, camera person, or other media representatives involved a memento of the Marshals Service. Marshals Service caps, mugs, T-shirts, and the like can help establish a rapport with a reporter that can benefit you in the future.

### Visiting-Producers and Editors

Of additional benefit is getting to know the producers and editors of the media outlets you've invited on ride-alongs. These people will have control of the news product after it leaves the reporter's hands. They have the authority to pull a story or to give it less play on the air or in the newspaper. As mentioned earlier, if your assigned reporter is unavailable, the editor or producer can send a camera person on the ride-along and have the reporter follow up later. They also are important sources to know if you are involved with future media events such as press conferences, or want to try and arrange some specific media coverage.



Setting up a ride-along gives you the opportunity to meet with or talk to producers and editors. At your first meeting with the reporter, ask who you should contact if the reporter is unavailable. The answer will probably be the name and telephone number of the editor or producer. You may be able to set up office appointments, or else talk to them over the phone. If you feel strongly about the need for media coverage, these are the people you need to sell your ideas to.

### Getting to the Final Product

Naturally, it's important to see the final product of the ride-along when it airs on TV or appears in the newspaper. You should arrange to videotape any TV news coverage or clip the resulting newspaper stories and send a copy of the videotape or news clipping to the Office of Congressional and Public Affairs.

If you haven't worked with the media before, or with a particular news organization, the ride-along offers an excellent opportunity to establish a relationship with your local reporters. It's a beginning that you can build on to your advantage. Learning to work with them makes good sense.

Will the media always act the way you'd like them to? Probably not. Will they always give you the coverage you want? Again, unlikely. But you can make a difference in what appears on television news and in the newspaper if you have a professional, working relationship with reporters. You can ensure they receive accurate, timely information in matters pertaining to the Marshals Service. The ride-along is a good place to start.

This booklet has attempted to address some of the basics of media ride-alongs. The scope is not all-inclusive. It was not intended to cover every situation that arises or every detail that you must consider. Simply put, there are situations that will be unique to each District, and reporters whose requirements will vary from city to city.

However, if you have other questions concerning ride-alongs that haven't been covered, or you would like advice about a particular media situation, please feel free to contact the Office of Congressional and Public Affairs. The phone numbers are 367-9065 (FTS) or 202-307-9065 (Commercial). We will make every effort to help you plan for a most successful ride-along.

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## MEMORANDUM OF UNDERSTANDING

## "OPERATION GUNSMOKE"

This Memorandum of Understanding is entered into by the federal, state, county, and municipal law enforcement agencies and the United States Marshals Service.

### PURPOSE

The purpose of the Memorandum is to outline the combined mission of the United States Marshals Service and these law enforcement agencies hereafter known as "Operation Gunsmoke" to concentrate their investigation efforts on armed individuals wanted on federal and/or state and local warrants for serious drug and other violent felonies. This Memorandum will formalize the policy, guidance, and planning between the participating agencies.

### MISSION

The primary mission of "Operation Gunsmoke" will be to seek out and attempt to take into custody those persons believed to be armed or have access to firearms or whose backgrounds reveal a tendency for violence and recidivism. "Operation Gunsmoke" will concentrate on armed fugitives who are wanted for crimes such as; murder, armed robbery, arson, sexual assault, drug sales, trafficking, firearms offenses or any crime in which violence was used. Also, individuals armed while within a school zone as listed in the federal law known as the "Gun Free School Zone Act", will also be targeted.

The United States Marshals Service and each participating law enforcement agency will identify those outstanding felony warrants on which "Operation Gunsmoke" will focus.

The intent of this joint effort will be to locate and arrest those federal and state fugitives with violent felony histories and other identified career criminals, thereby increasing public safety.

## COMPOSITION - CHAIN OF COMMAND

### A. "OPERATION GUNSMOKE"

"Operation Gunsmoke" will consist of a combined body of members from state and local law enforcement departments plus deputies and agents from the United States Marshals Service and other federal agencies.

### B. "OPERATION GUNSMOKE" DIRECTION

The policy, program involvement, and direction of "Operation Gunsmoke" shall be the joint responsibility of the Steering Committee. If necessary, representatives from all agencies shall meet and confer on matters pertaining to policy and management of the operation.

The local officers will, for administrative purposes, report directly to their commanding officers. The supervising USMS employee will report directly to the U.S. Marshal and the Enforcement Division.



### C. SUPERVISION

Supervision of the personnel assigned to "Operation Gunsmoke" will be the mutual responsibility of the participating agencies. Responsibility for the conduct of the assigned personnel will rest within the respective agency's policies and procedures.

Operational problems will be mutually addressed and resolved by the assigned supervisors. If problems arise which cannot be resolved to their mutual satisfaction, they should be presented progressively to the next highest authority in both agencies for resolution. It is agreed that the resolution of operational problems at the lowest possible level is in the best interest of the operation. "Operation Gunsmoke" headquarters office will be located at the USMS Headquarters, Arlington, VA.

## EQUIPMENT

Each agency will be equipped with its own radio frequency. The USMS will supply enough radios to equip each vehicle with the Marshals Service frequency and the communications security frequency. Radio will be the main source of communication.

## RECORDS AND REPORTS

All "Operation Gunsmoke" investigative reports will be maintained at the site office.

PROCEDURES

A. Tour of Duty

Members of "Operation Gunsmoke" will be dedicated full time to the investigation and execution of outstanding federal and state warrants. Continued assignment of members will be based on performance and will be at the discretion of their respective departments and United States Marshals Service supervisors.

B. Integration of Unit

All cases will be jointly investigated. Each team unit will consist of state and/or local police and USMS and other federal agency representatives. It is agreed that unilateral action on the part of either agency is not in the best interest of "Operation Gunsmoke".

C. Assignment of Cases

"Operation Gunsmoke" supervisors will assign cases to each team. The team will be totally responsible for the proper investigation of each case from start to finish.

D. Prosecution

An arrest based on a warrant will be prosecuted in the federal or state court that has venue. A determination will be made on a case-by-case basis when there is an arrest of a fugitive who has a warrant in both the federal court system and the state court system, as to sequence of prosecution.

The criteria for the decision will be based on which level the prosecution would be of the greatest benefit to the overall operation. Recommendations shall be made to the prosecutors concerned.



INFORMANTS

It is agreed that funds for informants relating to the execution of federal, state, and local warrants will be supplied by the United States Marshals Service pursuant to Marshals Service regulations.

PERSONNEL

The Departments agree to furnish officers, deputies, or agents for the entire period in accordance with the provisions of the PROCEDURES paragraph, page 2, of this Memorandum of Understanding.

DURATION

Effective the first day of the operation, the term of this understanding shall be for a 74 day period and shall be terminated upon the withdrawal of either agency. Upon termination of this understanding, all equipment will be returned to the supplying agency.

NATIONAL PRISONER TRANSPORTATION SYSTEM (NPTS)

Any state and local fugitives arrested or located in other detention facilities, within the United States and its territories, as a direct result of investigations conducted during "Operation Gunsmoke," will be transported to the respective venue at no expense to the participating agency.

PRESS EMBARGO

It is agreed that no mention will be made to the press about "Operation Gunsmoke" until a joint press statement can be prepared at the culmination of the operation. That press statement will be coordinated through the U.S. Marshals Service Office of Congressional and Public Affairs.

PRESS RELEASE

At the end of "Operation Gunsmoke", a press conference will be held to announce the results of the operation. Expenses for travel to the press conference and lodging while there for one representative of each participating agency will be paid by the U.S. Marshals Service. The site of the press conference will be announced prior to the end of the operation.

Montgomery County
Sheriff's Office
50 Courthouse Square, T-8
Rockville, Maryland 20850
217-7007

UNITED STATES MARSHAL

(STATE/LOCAL AGENCY)

_____ DISTRICT OF _____

/s/ Raymond M. Kight
Raymond M. Kight
Sheriff

2/12/92
Date

Date



| | Phase I | 01/17/92 | 04/24/92 |
|---|---|---|---|
| | DUSMs IN DISTRICT | DUSMs OUT OF DISTRICT | STATE/ LOCAL OFFICERS |
| HOUSTON | 6 | 12 | 6 |
| SAN DIEGO | 4 | 6 | 4 |
| LOS ANGELES | 11 | 15 | 12 |
| MIAMI | 9 | 13 | 8 |
| NEW YORK | 14 | 23 | 14 |
| NEWARK | 3 | 3 | 3 |
| BALTIMORE | 2 | 2 | 4 |
| DC SupCT/ DistCT/Alex | 11 | 8 | 10 |
| PHOENIX | 4 | 6 | 4 |
| | Phase II | 01/24/92 | 04/30/92 |
| DALLAS | 6 | 6 | 6 |
| DETROIT | 6 | 2 | 6 |
| PHILLY | 7 | 0 | 5 |
| CHICAGO | 5 | 6 | 5 |
| NEW ORLEANS | 5 | 2 | 5 |
| SEATTLE | 4 | 0 | 4 |
| KANSAS CITY | 5 | 0 | 5 |

**UNITED STATES MARSHALS SERVICE**

**POLICY NOTICE**

NUMBER: 94-006 DATE: March 21, 1994

SUBJECT: **MEDIA POLICY**

BACKGROUND

The Office of Policy and Communications (OPC) serves as the focal point for media queries about the USMS and its operations. This centralization ensures a timely and consistent response, facilitates the appropriate coordination with the Department of Justice (DOJ), and ensures conformity with U.S. Marshals Service (USMS), DOJ, and Administration policies. The Office is also responsible for review and approval of all USMS publications, of articles written by USMS employees about the Service and intended for release to external publications, and liaison with writers, publishers, and television production companies. In addition, OPC provides media-liaison support for district offices for high profile trials or other events which involve significant media coverage.

POLICY

For the purpose of this policy, "media" refers to both print media (newspapers, wire services, magazines, books) and electronic media (radio and television news and entertainment programs, motion pictures, and video productions).

Reporting. All incidents occurring in a district which have generated or can reasonably be expected to generate greater than local media or public interest are to be



reported to the Chief Policy and Communications Officer as soon as possible. The notification to OPC is in addition to the reporting of significant operational incidents to the Associate Director of Operations. Whenever possible, contact should be made in advance of such matters, so that we may inform, and coordinate with, the Department of Justice.

United States Marshals and Chief Deputies. U.S. Marshals and their Chief Deputies serve as the local information officers and may respond to media and public inquiries relating to their district within the guidelines set forth herein. They are [copy missing] staffs are aware that *only* the U.S. Marshal, the Chief Deputy, or an individual specifically designated by the Marshal, are the authorized spokespersons for the district on local operational incidents, and that other staff members are required to direct any news media inquiries to them. The Marshal or Chief Deputy may delegate to other personnel the authority to provide information to the news media when circumstances make it impractical for the Marshal or Chief Deputy to do so (e.g., when an operational event occurs in a district suboffice location and neither the Marshal nor Chief Deputy are available or sufficiently informed of details to respond to media inquiries). Specific advice on interacting with media representatives is contained in the "Media Guidelines Booklet" which can be obtained from OPC.

Coordination with U.S. Attorney. Department of Justice guidelines require field offices to obtain approval from the local U.S. Attorney prior to issuing news releases, convening press conferences, or contacting the media relative to any case or matter which is being litigated, or

which may be litigated (this would include investigations in progress), by the U.S. Attorney's office. Because there are a number of issues related solely to the operations of the USMS (such as court security and prisoner transportation) which are of interest to the media, but which do not involve litigation and about which the U.S. Attorney would not have pertinent information, U.S. Marshals should discuss this requirement with the U.S. Attorney for their district to determine more specifically the areas requiring approval and the procedures to be observed. This is especially important in districts where media contact is frequent. Fugitive case matters should be discussed, because they are viewed somewhat differently from other criminal matters, and contingency procedures – such as who will be responsible for media statements in the event of a shooting – should also be covered. If U.S. Marshals encounter problems with adhering to the guidelines and cannot resolve them locally, they should contact the Chief Policy and Communications Officer for guidance.

Assisting the News Media.

A. In order to promote the aims of law enforcement, including the deterrence of criminal conduct and the enhancement of public confidence, USMS personnel, with the prior approval of the U.S. Attorney, and except as indicated in paragraph C below, may assist the news media in photographing, taping, recording, or televising a law enforcement activity. The U.S. Attorney will consider whether such assistance would unreasonably endanger any individual, would prejudice the rights of any party or other person, or is otherwise proscribed by law.



B. Other than by reason of a Court order, USMS personnel shall not prevent the lawful efforts of the news media to photograph, tape, record, or televise a sealed crime scene from outside the sealed perimeter.

C. In cases in which a search warrant or arrest warrant is to be executed, no advance information will be provided to the news media about actions to be taken by law enforcement personnel, nor shall media representatives be solicited or invited to be present. This prohibition also applies to operations in preparation for the execution of warrants and to any multi-agency action in which USMS personnel participate. If news media representatives are present, USMS personnel may request them to withdraw voluntarily if their presence puts the operation or the safety of individuals in jeopardy. If the news media representative declines to withdraw, USMS personnel should consider cancelling the action, or their participation in it if that is a practical alternative. Exceptions to this policy may be granted in extraordinary circumstances by the Attorney General or Deputy Attorney General.

D. In any filming or taping by news media, caution should be used not to reveal the faces of any individuals whose effectiveness or safety may be compromised. USMS personnel who do not wish to appear on a film or video tape which will be shown publicly are not required to do so. USMS employees should advise the news media of their concerns in this regard and request that they avoid such filming. In any filming conducted by, or sponsored by, the USMS, faces of subjects and third parties

(e.g., family members) must be blurred to prevent recognition before the tape is released to the media or shown publicly.

Media "Ride-Alongs". It is the current policy of the Department of Justice that media "ride-alongs" *not* be conducted. (In this context, "ride-alongs" do not encompass the air or bus movement of prisoners.)

Release of Information and Restrictions. The Department of Justice has established specific guidelines, consistent with the provisions of 28 CFR 50.2, governing the release of information relating to criminal and civil cases. This policy is based on the need to balance interests involving the right to a fair trial, the right of the public to know, and the Government's ability to administer justice.

A. General. No USMS employee should furnish any statement or information that he or she knows, or reasonably should know, will have a likelihood of prejudicing a legal proceeding.

B. Confidentiality. Careful weight must be given in each case to protecting the rights of victims and litigants as well as the protection of the life and safety of other parties and witnesses. To this end, the Courts and Congress have recognized the need for limited confidentiality in:

1. On-going operations and investigations;
2. Grand jury and tax matters;
3. Certain investigative techniques; and,
4. Other matters protected by the law.



C. Disclosable Information.

1. USMS personnel, subject to specific limitations imposed by law, or by court rule or order, and consistent with the provisions of this section, may make public the following information in any criminal case in which charges have been brought:

a. The defendant's name, age, hometown name, occupation or name of employer, marital status, and similar background information;

b. The substance of the charge, limited to that contained in the complaint, indictment, information, or other public documents;

c. The identity of the investigating and/or arresting agency and the length and scope of an investigation; and

d. The circumstances immediately surrounding an arrest, including the time and place of arrest, resistance, pursuit, possession and use of weapons, and a description of physical items seized at the time of arrest. Any such disclosures shall not include subjective observations.

2. In the interest of furthering law enforcement goals, the public policy significance of a case may be discussed by the appropriate U.S. Attorney or Assistant U.S. Attorney.

D. Civil Cases. In civil cases, similar identification material regarding defendants, the concerned government agency or program, a short statement of the claim, and the government's interest, may be released.

E. Disclosure of Information Concerning Ongoing Investigations. Except as provided below, USMS personnel shall not respond to questions about the existence of an ongoing investigation or comment on its nature or progress, including such matters as the issuance or serving of a subpoena, prior to the public filing of the document. *Exception:* In matters that have already received substantial publicity, or about which the community needs to be reassured that the appropriate law enforcement agency is investigating the incident, or where release of information is necessary to protect the public interest, safety, or welfare, comments about, or confirmation of, an ongoing investigation may need to be made. In these unusual circumstances, the U.S. Attorney handling the matter must be consulted and must approve dissemination of any information to the media.

F. Disclosure of Information Concerning Person's Prior Criminal Record.

1. USMS personnel shall not disseminate to the media any information concerning a defendant's or subject's prior criminal record, except convictions, either during an investigation or pending litigation. However, in certain situations, such as with fugitives or extradition cases, USMS personnel may confirm the identity of defendants or subjects, and the offense(s). Where a prior *conviction* is an element of the current charge, such as in the case of a felon in possession of a firearm, USMS personnel may confirm the identity of the defendant and the general nature of the prior conviction where such information is part of the public record in the case at issue. There are other circumstances where it may be permissible to release information about prior convictions, such



as when discussing career criminals. The Office of Policy and Communications should be consulted in such cases.

2. The release of information concerning an investigation, arrest, release, prosecution, adjudication of charges, or correctional status is not appropriate if it is not reasonably contemporaneous with the event to which the information relates. For example, if a convicted felon has served his sentence and resumed his place in society, it would not be appropriate to release information about his prior record or incarceration without a law enforcement purpose.

G. Concerns of Prejudice.

1. Because the release of certain types of information could tend to prejudice an adjudicative proceeding, USMS personnel should refrain from providing the following information:

a. Observations about a defendant's character;

b. Statements, admissions, confessions, or alibis attributable to a defendant, or the refusal or failure of the accused to make a statement;

c. Reference to investigative procedures, such as fingerprints, polygraph examinations, ballistic tests, or forensic or laboratory services, or to the refusal by the defendant to submit to such tests or examination;

d. Statements concerning the identity, testimony, or credibility of prospective witnesses;

e. Statements concerning evidence or argument in the case, whether or not it is anticipated that such evidence or argument will be used at trial;

f. Any opinion as to the defendant's guilt, or the possibility of a plea of guilty to the offense charged, or the possibility of a plea of a lesser offense.

2. A news release should contain a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

H. Publications, News Releases, News Conferences, and Interviews.

1. Dissemination or publication of information concerning USMS activities which may receive regional or national attention requires the approval of the Chief Policy and Communications Officer.

2. USMS personnel will not disclose information about:

a. Any operation, investigation, or security activity which would jeopardize its success or affect the safety of those involved;

b. Sensitive sources of information leading to arrest – e.g., confidential informants, undercover officers, intelligence sources, electronic surveillance;

c. Third parties – any individual who is not the subject of the activity;

d. Prisoners (see below).



I. Publicity and Photography of Federal Prisoners. Procedures related to the publicity and photography of federal prisoners are outlined in the Prisoner Operations chapter of the USMS Manual. As a general rule, post-arrest photographs of prisoners or fugitives are not made available to the news media unless the individual has been the subject of a "Wanted Poster". As with other criminal history information, there is a time element to be considered in the release of such information (see VIII, F, 2 above). Booking photographs may be released if the subject is a fugitive and the release of the photograph is for the purpose of locating that individual; otherwise, "mugshots" will not be released. Requests for exceptions to the general rule must be referred to the Office of Policy and Communications.

J. Interviews of USMS Detainees. The USMS takes a neutral posture on the issue of media interviews of prisoners in USMS custody. If the prisoner, the judge in the case, the U.S. Attorney, the defense attorney, and the management of the facility where the prisoner is located approve the request for an interview, USMS personnel should assist in facilitating the interview if security is not compromised and it is not costly to the USMS to do so. However, it is the reporter's responsibility to obtain the approval of the parties mentioned and to ensure that the parties indicate their approval to the U.S. Marshal (in writing, if requested by the Marshal).

K. Prisoner Movement. Information about extraditions or the movement of prisoners in USMS custody will not be given out to the news media in advance. It is permissible to confirm that someone is a prisoner and

where they are confined, if this information does not jeopardize security.

**Referral of News Articles and Radio/TV Reports.** U.S. Marshals should send to OPC newspaper clippings of any activities within their districts which specifically mention the U.S. Marshal's office, Deputy Marshals, or operations.

**TV and Motion Picture Production Companies.** The Chief Policy and Communications Officer coordinates USMS communications with television and motion picture production companies, and commercial publishers and authors. All requests from producers/authors, including television network news daily telecast and magazine shows (e.g. "60 Minutes"), for story ideas or other kinds of assistance must be referred to OPC.

**Publications and Speeches.** Articles or papers written by USMS employees that pertain directly to the primary mission activities of the USMS for publications circulated outside the Department of Justice must be cleared in advance by the Chief Policy and Communications Officer.

The Standards of Conduct for Executive Branch Employees prohibits an employee from being compensated for speaking or writing which relates the employee's official duties. 5 C.F.R. § 2635.807(a). Accordingly, Marshals Service personnel cannot be compensated for writing an article or making a speech when the topic of that article or speech is a Marshals Service policy, the mission of the Service or related to the employee's duties. The Office of the General Counsel should be contacted for guidance in this area.



PROPONENT: Office of Policy and Communications. Point of contact: Katherine K. Decudes, MNETS, 202-307-9065.

DISTRIBUTION: All Headquarters and District Offices

POSTING INSTRUCTION: File this Notice with Chapter 2.2 USMS Manual (unrevised).

/s/ Illegible
Director

3/21/94
Date

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, MARYLAND
STATE OF MARYLAND
MONTGOMERY COUNTY TO WIT:

WARRANT
CRIMINAL NO. 54859 JUDGE: L. RUBEN

THE STATE OF MARYLAND, TO ANY DULY AUTHORIZED PEACE OFFICER, GREETING: YOU ARE HEREBY COMMANDED TO TAKE DOMINIC JEROME WILSON

IF HE/SHE SHALL BE FOUND IN YOUR BAILIWICK, AND HAVE HIM IMMEDIATELY BEFORE THE CIRCUIT COURT FOR MONTGOMERY COUNTY, NOW IN SESSION, AT THE JUDICIAL CENTER, IN ROCKVILLE, TO ANSWER AN INDICTMENT, OR INFORMATION, OR CRIMINAL APPEALS UNTO THE STATE OF MARYLAND, OF AND CONCERNING A CERTAIN CHARGE OF THEFT U/$300
VIOLATION OF PROBATION

BY HIM COMMITTED, AS HATH BEEN PRESENTED, AND SO FORTH. HEREOF FAIL NOT AT YOUR PERIL, AND HAVE YOU THEN AND THERE THIS WRIT.



WITNESS, THE HONORABLE CHIEF JUDGE OF THE SIXTH JUDICIAL CIRCUIT OF MARYLAND.

DATE OF BIRTH: 09/01/64

[LOGO]

/s/ Bettie A. Skelton
BETTIE A. SKELTON, CLERK
of the Circuit Court for
Montgomery County, Maryland
50 Courthouse Square
Rockville, MD 20850-2393

DATE ISSUED 04/14/92

SHERIFF'S RETURN

INVESTIGATING OFFICER: DB HDQ.#:

CEPI: DATE:

BA58

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, MARYLAND
STATE OF MARYLAND,
MONTGOMERY COUNTY TO WIT:

WARRANT
CRIMINAL NO. 53907 JUDGE: L. RUBEN

THE STATE OF MARYLAND, TO ANY DULY AUTHORIZED PEACE OFFICER, GREETING: YOU ARE HEREBY COMMANDED TO TAKE DOMINIC JEROME WILSON

IF HE/SHE SHALL BE FOUND IN YOUR BAILIWICK, AND HAVE HIM IMMEDIATELY BEFORE THE CIRCUIT COURT FOR MONTGOMERY COUNTY, NOW IN SESSION, AT THE JUDICIAL CENTER, IN ROCKVILLE, TO ANSWER AN INDICTMENT, OR INFORMATION, OR CRIMINAL APPEALS UNTO THE STATE OF MARYLAND, OF AND CONCERNING A CERTAIN CHARGE OF ROBBERY
VIOLATION OF PROBATION

BY HIM COMMITTED, AS HATH BEEN PRESENTED, AND SO FORTH. HEREOF FAIL NOT AT YOUR PERIL, AND HAVE YOU THEN AND THERE THIS WRIT.



WITNESS, THE HONORABLE CHIEF JUDGE OF THE SIXTH JUDICIAL CIRCUIT OF MARYLAND.

DATE OF BIRTH: 09/01/64

[LOGO]

/s/ Bettie A. Skelton
BETTIE A. SKELTON, CLERK
of the Circuit Court for
Montgomery County, Maryland
50 Courthouse Square
Rockville, MD 20850-2393

DATE ISSUED 04/14/92

SHERIFF'S RETURN

INVESTIGATING OFFICER: DB HDQ.#:

CEPI: DATE:

BA58

———

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, MARYLAND
STATE OF MARYLAND,
MONTGOMERY COUNTY TO WIT:

WARRANT
CRIMINAL NO. 52384 JUDGE: L. RUBEN

THE STATE OF MARYLAND, TO ANY DULY AUTHORIZED PEACE OFFICER, GREETING: YOU ARE HEREBY COMMANDED TO TAKE DOMINIC JEROME WILSON

IF HE/SHE SHALL BE FOUND IN YOUR BAILIWICK, AND HAVE HIM IMMEDIATELY BEFORE THE CIRCUIT COURT FOR MONTGOMERY COUNTY, NOW IN SESSION, AT THE JUDICIAL CENTER, IN ROCKVILLE, TO ANSWER AN INDICTMENT, OR INFORMATION, OR CRIMINAL APPEALS UNTO THE STATE OF MARYLAND, OF AND CONCERNING A CERTAIN CHARGE OF ASSAULT W/I TO ROB
VIOLATION OF PROBATION

BY HIM COMMITTED, AS HATH BEEN PRESENTED, AND SO FORTH. HEREOF FAIL NOT AT YOUR PERIL, AND HAVE YOU THEN AND THERE THIS WRIT.



WITNESS, THE HONORABLE CHIEF JUDGE OF THE SIXTH JUDICIAL CIRCUIT OF MARYLAND.

DATE OF BIRTH: 09/01/64

[LOGO]

/s/ Bettie A. Skelton
BETTIE A. SKELTON, CLERK
of the Circuit Court for
Montgomery County, Maryland
50 Courthouse Square
Rockville, MD 20850-2393

DATE ISSUED 04/14/92

SHERIFF'S RETURN

INVESTIGATING OFFICER: DB HDQ.#:

CEPI: DATE:

BA58

MCPID# 77230

| WILSON | DOMINIC | JEROME | |
|---|---|---|---|
| Last Name | First | Middle | Suffix |

Race B Sex M DOB 090164 POB MD HGT 600 WGT 185
EYE BRO. HAIR BLK

*Date & Source*
#1 2/92 P & P

*Street Number, Street Name, City, State, and Zip Code*
909 NORTH STONESTREET AV, ROCK. MD

*Phone Number*
279-7307

#2 _____

#3 _____

#4 _____

WORK _____

Motor Vehicle: Year _____ Make/Model _____

Tag# _____

SUSPENDED

Operator License# W425149402681 State MD Yr Expires 95

SSN 218 86 2503 FBI 616187CAZ SID 411867 ScarsMarks SC R WRIST

Caution Desc RESISTS/ASSAULTS POLICE/ARMED

Misc: VOP- ROBBERY



****Supplemental Record Entry (AKA's, DOB's, Add SSN's, Scars, Marks, Tatoo's)****

| AKA | DOB | SSN | SCARS, MARKS, TATOOS |
|---|---|---|---|
| WILSON, DOMINI J | | 040164 | SC R EYE |
| WILSON, DOMINICK JEROME | | 213862503 | GLASSES |
| TAT CHEST | | | SC FHD SC L HND |
| STONEY, DOMINIC JEROME | SC CHEST TAT UL ARM | | |
| | | | SC R HND TAT L BRST |

| 53907 | | 5012 | |
|---|---|---|---|
| OCA/Case# | | Offense Code | |
| 1299 | | 4 | |
| *Charge Type* | | *War Type* | |
| 041492 | G | Y | M |
| Date of Warrant | Caution Code | *VOP* | *M/O* |

*Case Type* CRI *Court Type* C Sent To: _____

PO 15 PO PO PO 26 16 16 17 16
NCIC Fingerprint Classification

Henry Classification _____

Tracking Number 634471D5

CR Number _____

Rec'd Date 041492 Deputy/Date _____

P.O. Check _____

CompWork CH Date 041592 Prep By _____ Date _____ ID _____ Date _____ QC By _____

MILES/NCIC Entered By Blt

Date 4/16/92

*NCWS Entered By* _____ *Date* _____

Worksheet Location: Silver Spring _____

Wheaton _____ Rockville/Bethesda X

Germantown _____ File _____

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## EXCERPTS FROM THE SEPTEMBER 19, 1995 DEPOSITION OF GERALDINE E. WILSON

Q One of the claims that you do make here in the lawsuit is that some people were taking pictures at the time.

A That's true.

Q And what did you think of that at that time.

A I was upset by it, because I was standing there in a thin nightgown and my husband was laying on the floor in his underwear. Here all these men in my house. It was very inappropriate and it was embarrassing. It was humiliating.

Q When did you ultimately discover that the person who was taking the pictures was a reporter from "The Washington Post," or did you ever find that out until today?

A It was much, much later. I can't remember at specifically what point in time I found it out, but it was not immediately.

Q Okay. And you don't know whether or not the pictures that he took in the apartment were ever publicized in any way?

A I do not know what became of the pictures that were taken in my house.

G. Wilson Depo. at 20-21

Q How do you feel currently now that you know it was "The Washington Post" reporters who were in your house?

A I feel that it was an invasion of my privacy and it should not have happened. It should never have been allowed to happen. They never should have been brought to my house.

Q But at that time you didn't know that they were members of the press?

A I had no idea who they were.

G. Wilson Depo. at 22.

Q At which point in time did they start taking pictures?

A Charlie was on the floor sprawled out in his underwear. I was standing in the kitchen in my nightgown.

G. Wilson Depo. at 23.

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EXCERPTS FROM THE SEPTEMBER 19, 1995
DEPOSITION OF CHARLES E. WILSON, JR.

Q Did you believe that the reporter and photographer from "The Washington Post" had done anything wrong?

MR. SELIGMAN: Objection. You're assuming that he knew it was "The Washington Post."

BY MR. NATHAN:

Q You can answer.

A Like the marshals, I had no idea who it was taking pictures.

C. Wilson Depo. at 63.

Q What about those two people did upset you?

A One person was taking pictures of me in the nude. Well, I had on a pair of briefs. I thought that was wrong.

C. Wilson Depo. at 71.

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CHARLES H. WILSON, ET AL.,

Plaintiffs,

v.

RAYMOND M. KIGHT, ET AL.,

Defendants.

Case No.: PJM-9-1718

6500 Cherrywood Lane
Greenbelt, MD 20770
December 4, 1995

TRANSCRIPT OF MOTIONS HEARING
(EXCERPT: OPINION OF THE COURT)
BEFORE THE HONORABLE PETER J. MESSITTE
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:
For the Plaintiffs:
JAMES S. FELT, ESQUIRE
KRISTIN AMERLING, ESQUIRE
RICHARD A. SELIGMAN, ESQUIRE
ARTHUR B. SPITZER ESQUIRE

For the Defendants:
STUART M. NATHAN, ESQUIRE
PIERRE R. ST. HILAIRE, ESQUIRE

Audio Operator:
ELLA STALLINGS

Transcription Service:
MONIQUE E. GIBSON
M.E.G. TYPING & TRANSCRIPTION

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

THE COURT: All right. I'm going to give you my decision now, gentlemen, ladies.



This matter is a suit of Charles H. Wilson, et al., against defendants, Mark Collins, Harry Layne, Joseph Perkins, Brian Roynestad, and Eric Runion. It is a civil action for damages and declaratory relief allegedly to redress deprivations of certain civil rights under 42 USC Section 1983 and also with regard to the federal agents under [*Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*," 403 U.S. 388 (1971)].

Plaintiff Charles Wilson and, I gather, his wife, Geraldine Wilson, are residents of Montgomery County [, Maryland]. The minor plaintiff in the case is Valencia Snowden through her mother and next friend, Raquel [Snowden].

Defendants Collins, Runion, and Roynestad are Montgomery County deputy sheriffs. Defendant Harry Layne was at relevant times in this suit a supervisory deputy U.S. marshal in the U.S. Marshal's Office for the Superior Court of the District of Columbia and site supervisor for the Washington, DC operation [of "Operation Gunsmoke"]. Defendants Perkins and Olivio were deputy U.S. marshals who were involved in the incident that I will describe momentarily. And defendant United States of America is in the case by reason of the fact that the U.S. Marshal Service are employees of same were involved in this transaction.

It appears that in or about February of 1992, the U.S. Marshal Service in a joint effort with the Montgomery County Sheriff's Department engaged in a pursuit of hard-core fugitives including parole and probation violators, an operation called Operation Gunsmoke. Defendant

Layne was the Washington area supervisor of this venture. And Montgomery County, pursuant to memorandum of understanding on or about February 12, 1992 executed by their sheriff, agreed to participate in this joint venture, Operation Gunsmoke.

The events in question began in or about April of 1992 when the Circuit Court for Montgomery County issued a bench warrant for the arrest of one Dominic Jerome Wilson based on alleged violation of probation. Wilson was apparently on probation for, as I understood it, robbery at the time. He also had a record which involved elements of violence in his past and was specifically – it was noted to the arresting officers that he was potentially armed and could be dangerous and violent. That was part of the factual base at the time.

In the records of the Montgomery County Sheriff Department, Dominic Wilson had listed as his address 909 North Stone Street Avenue in Rockville and that those records also were similar to records that were held by the probation office involved with active probation that Wilson was being sought for violation of. And that that address had been listed on numerous occasions by Wilson as his address. It turns out that the address was, in fact, the home of Charles and Geraldine Wilson, the parents of Dominic Wilson.

With that information and with the warrant in hand, various of the defendants came upon the 909 North Stone Street address at approximately 6:30 a.m. on April 16, 1992. Now, as I understand it, all the defendants but Layne were on site at that time, is that correct, both the sheriffs and the marshals.



According to the allegations of the defendants, just before they knocked on the door, they had taken into custody the brother of Dominic Wilson on a presumably unrelated charge. And he had been driven to the front of the premises and had indicated some time within 30 to 45 minutes prior to the entry that, in fact, Dominic Wilson lived at that address and, in fact, had been there the night before.

The further indication is that at approximately 6:45 a.m. when the defendants knocked at the address, the child, Valencia Snowden, then nine years old, as it happened the daughter of Dominic Wilson, although that was not known to the officers at the time, answered the door. The allegation of the defendants is that when she answered the door, the inquiry was is Dominic Wilson at home and she answered she didn't know. And then presumably there is some dispute about whether there was a knock and announce, although the officers indicate that they announced that they were there with a warrant for the arrest of Dominic Wilson.

The officers then entered into the home at this early morning hour. And plaintiffs, Charles and Geraldine Wilson, were in their bedroom in bed. They heard commotion and got up, came to the door, and were confronted by Perkins, Olivio, and Collins pointing guns and that Mr. Wilson raised his hands and stood still. He was only dressed in his undershorts. According to the plaintiffs, the defendant[s] did not identify themselves. They say that he did. In any event, there was an alleged statement by Perkins to Wilson at gunpoint to "get the fuck on the floor." And then at that point Wilson was forced to the floor as he was complying with Perkins' order. It is

alleged also by Wilson that [Olivo] put his knee into Wilson's back and held the gun to his head while he lay on the floor. And that Geraldine Wilson came to the scene and observed what went on while all this was happening.

There was questioning about the whereabouts of Dominic Wilson, the adult son of the plaintiffs. The defendants had photographs of Dominic Wilson, and they showed the photographs. And it was obviously not the same person as Charles Wilson whom they encountered at that time. It is alleged by the plaintiffs that they indicated that first of all, that plaintiff Charles Wilson was not Dominic Wilson, that Dominic Wilson did not live there, and that he wasn't there, and that he hadn't been seen for two weeks. And that was apparently confirmed by Mrs. Wilson. There was some alleged threats that the Wilsons might be incarcerated if Wilson was found in their house, that is Dominic Wilson. In any event, there was a search [of] the home. Nobody else was in the home other than the child. Mr. Wilson indicates that he was forcibly restrained on his living room floor at gunpoint for approximately 10 minutes including, he says, after defendants had verified [that] there was no one else in the home. Then the defendants left. Apparently there was also some alleged shouting by the defendants at Mr. Wilson. The defendants say that Mr. Wilson himself shouted and used epithets during that time.

That is essentially the factual predicate of the case as far as any alleged physical imposition upon the plaintiffs.

The other fact of some significance is in the case that, pursuant to a media ride along policy that was apparently in effect in at least this region of the marshal's



service, one or more reporters and/or photographers from the Washington Post accompanied marshals and sheriffs in their operations including in the Wilson home on that evening. And it appears that either one – were there two total, a photographer and a reporter? That both may have entered the home that [morning]. And the photographer, I think it is stipulated, did take pictures of Mr. Wilson when he was in custody under arrest, possibly on the floor in his undershorts being restrained as he was. And that they were not in the home with the consent of the Wilsons, but they simply tailed along, piggybacked on the warrant that the officers had with regard to Dominic Wilson.

This suit has followed, and in the second amended complaint, there are allegations against all of the defendants in this case, specifically with regard to all who entered the premises, that there was an unlawful entry and search in the case. And secondly, that there was an unlawful search in that the media was brought in to accompany the officers who were operating pursuant to the arrest warrant. And third, that once inside, one or more of the officers applied excessive force to the Wilsons in trying to execute this warrant. There is no dispute that Dominic Wilson was not found on the premises at that time, and eventually the officers all departed.

The Court will address these several issues now as it has various motions for summary judgment filed before it, motions by the individual defendants, both county and federal. There also was a motion for summary judgment that was filed by plaintiffs that the Court did not receive as late filed, and I'll have more to say about that at an appropriate time.

But the Court visits first the issue of the alleged illegal entry in connection with this case. It has been held in Payton v. New York, 445 US 573, a 1980 Supreme Court case,

> "For Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives where there is reason to believe the suspect is within."

That is the general proposition that we confront here. And so we ask whether in executing this warrant there was probable cause that would rather – whether there was reason – let me [restate] that. This test has been refined somewhat to have basically a two-prong requirement. First, that there be a basis for believing, a reasonable belief that the suspect dwells at the indicated address; and secondly, that there is reason to believe that at the time of the arrest, the suspect is within the dwelling. And there was a number of cases that have visited that issue before.

Let us address, first of all, the facts of this case in the first prong. There's no question that there was a reasonable basis and probable cause if there is indeed a distinction between the two, to believe that Dominic Wilson resided at the indicated address. The fact that it was the given address by him during his active probation in the Court's view would suffice, but certainly there was more. The sheriffs had the address. He had used it on arrest records in the past. That's all that was necessary to establish the first prong. To the extent that there is some dispute of fact, it perhaps would not be appropriate to weigh the other facts that the defendants rely on.



Although there does not appear to be any dispute of fact that the child was asked is Mr. Wilson at home, and she said she didn't know. That too would add to the calculus to establish that there was reason to believe that Wilson was within, but frankly, it's not necessary for satisfaction of the first prong. It's enough that he was there.

The second issue is whether there was reason to believe that at the time that the warrant was being executed Wilson was dwelling within. The suggestion made by the plaintiffs is that it is not enough merely to say that at between 6:30 a.m. and 6:45 a.m. there would be reason to believe that someone such as – that Wilson would be at this address. And in that regard, the plaintiffs rely on Harrison v. Kuchar, 702 F. Supp. 178, a Northern District of Illinois case from 1988. The defendants on the other hand draw the Court's attention to U.S. v. Stinson, 357 F. Supp. 1026, a 1994 case from the District of Connecticut, which basically held – this being 857 F. Supp. at 1031,

> "Furthermore, once they had reason to believe that Stinson was living at the State Street address, it was reasonable for the officers to believe that Stinson would actually be at the address at approximately 7:00 a.m. on May 5, 1994 when the warrant was executed,"

citing cases that were in accord. The Court finds as a matter of law objectively that it was reasonable on the basis of it being that early morning hour to believe that the suspect, Dominic Wilson, was at the address where they had reason to believe he dwelled. And that alone would make it objectively reasonable for the officers to do what they did.

And accordingly, that would dispose of any cause of action for violation of Fourth Amendment rights, at least insofar as the alleged illegal entry is concerned. If there's any doubt about it, however, it goes to establish qualified immunity on the part of all the officers in this case. In order for there to be any liability in connection with this sort of issue, one would have to identify the specific right allegedly involved. I'm going from Pritchard v. Alfred, 973 F.2d 307, a Fourth Circuit case from 1992. This at 312. Ruling on a defense qualified immunity requires identification of the specific rights allegedly violated, determining whether at the time the alleged violation the right was clearly established, and third, if so, then determining whether a reasonable person of the officer's position would have known that doing what he did would violate that right. The first two of these present pure questions of law for the Court, and that's as far as you really need to go with regard to the first court here. Assuming the specific right is not to have your home entered without pursuant to arrest warrant for someone where there isn't reason to believe that he is within, clearly there was some issue about – and to refine it even more precisely whether it would suffice merely to go in at an early hour and comply with the constitutional requirements, clearly there was some ambiguity as of the time of this alleged search, April 1992, as to whether that would have been allowable given the division of opinion between Stinson and Harrison. And the Court finds accordingly that because the right was not clearly established there would be no liability with regard to the first Fourth Amendment violation.



Now, the second issue deals with the alleged excessive force once inside. And to recite again the facts as they appear, there was some harsh language used allegedly by the invading officer or officers, that Mr. Wilson was told to lie down on the ground, that a knee was put on his back, that a gun was held on him and perhaps close to his head. And the allegation is that that constituted excessive force. Now, had I been deciding this case on facts that occurred very recently in light of the recent Fourth Circuit case of Taft v. Kleins, 1995 West Law 679189, a Fourth Circuit case decided on November 16, 1995, I might have come out one way. But frankly, it seems to me that in order to establish whether – well, I'm jumping ahead on the qualified immunity, and I'll stay with that for a moment. Assuming that there was excessive force that was used, in order to establish whether or not there would be liability, it seems to me that the case of Mench v. Diar, 956 F.2d 36, a Fourth Circuit case from 1991 would be applicable, where the wrong person was arrested. And even so, the officers attempting to arrest him, anticipating that there might be violence and noting that there was some shouting and running and refusing to cooperate on the part of the defendant, held him down and restrained him and handcuffed him and also drew a gun on him, I believe. In that case as well as Simons v. Montgomery County Police Officers, 762 F.2d 30, a 1965 case, an appropriate amount of force, even though it was invasive, if you will, was used and was deemed to be reasonable under the circumstances.

So that when you look at the facts of this case, either you've got – and you do have both actually – an objectively reasonable series of acts taken by the officers,

however harsh they might have been viewed by the individual plaintiffs, and, therefore, it was reasonable on that basis. If there's any dispute about whether what they did was permissible, that it was sufficiently not clearly established that the sort of thing that they did was impermissible constitutionally speaking, and, therefore, there would be qualified immunity.

But in either case, either it was objectively reasonable or qualifiably immune. And under those circumstances, the Court would also grant summary judgment with regard to the excessive force claim alleged against any and all of the defendants.

Which [brings] us to the third claim that is alleged against the defendants. And that seems to involve not just a Fourth Amendment issue of an unreasonable search and seizure, but there seems to be a lot of state law causes of action mixed in here. I'm not really sure whether – and nobody seems to argue each of the separate case law causes of action here. Either it's an unreasonable search and seizure and it's constitutional, or it can be both. It can be negligence. It can be intentional infliction. It can be trespass. It can be a lot of things. But I think we've argued this primarily as a Fourth Amendment issue rather than the individual state claims as to whether they survive or not. I don't know. Have we?

MR. [ST. HILAIRE]: It's in our [brief] on behalf of the United States, Your Honor.

THE COURT: It's what.



MR. [ST. HILAIRE]: In our [brief] on behalf of the United States, that's who the common law claims are asserted against.

THE COURT: Well, I don't know where we are with regard to the common law claim, Mr. Felt, quite frankly.

MR. FELT: Well, it's their motion. We cross moved for summary judgment on this point under the invasion of privacy and trespass. I suppose it would also be a violation of the Maryland Declaration of Rights, Article 26.

THE COURT: Excuse me one second.

(Brief pause)

THE COURT: Well, I just wonder whether –

MR. FELT: I would say that also we would be entitled to summary judgment on those state law claims.

THE COURT: Well, I'm not sure how we – has the county responded to those issues, or is the county in that case? I guess the question I've got is have you – was there proper notice given under the State Tort Claims Act and anything like that for the common law causes of action? I mean, I'm not sure how you get summary judgment. There are a lot of procedural impediments to state law causes of action here that I really haven't heard about. Frankly –

MR. FELT: We have alleged in our complaint that we've done that, and we have in fact done what needs to be done under the Federal Tort Claims Act.

THE COURT: Well, federal torts perhaps, but what about the state torts?

MR. FELT: They've never made any –

MR. [NATHAN]: Well, we haven't raised that because we've sort of piggybacked on the federal claims to the extent that –

THE COURT: You've argued pretty much the federal claim here without the state causes of action being pursued.

MR. [NATHAN]: I mean, the Declaration of Rights claims are going to rise or fall within the federal claims.

THE COURT: I understand that. That's the same as the 1983 claims.

MR. [NATHAN]: To the extent that there was allegations of malice or gross negligence, the State Tort Claims Act doesn't apply.

THE COURT: Well, we may –

MR. [NATHAN]: We have actually gone ahead and responded. For instance, on the straight negligence claim, we just went ahead and responded that there was no creation of a duty.

THE COURT: All right.

MR. [NATHAN]: Otherwise, we've just adopted the federal position.

THE COURT: I'll handle those. All right. You have a seat.

MR. [NATHAN]: Okay.

THE COURT: Let us stay with the third cause of action against which alleges essentially unreasonable



search and seizure based on what is said to be the unauthorized presence of the Washington Post reporter and photographer. Now, this is characterized as possibly negligence or gross negligence or intentional infliction of emotional distress or trespass or invasion of privacy or some such. It comes in a lot of different forms. For present purposes, I'll just address it as an unreasonable search and seizure.

The argument that is made by the plaintiffs with regard to the presence of the officers is that that violates Fourth Amendment rights, and essentially, if you will constitutes an invasion of privacy. I think that's really the essence – or trespass. That's the essence of what we're talking about. And that particularly insofar as the home is involved, that that is a particularly protected location.

The analysis that the defendants offer in this regard is that, assuming that a specific right has been allegedly violated, that at the time of the violation, [April 16, 1992], that right was not clearly established. And even if it was clearly established, then a reasonable person in the officer's position would have known that – in this case, would not have known according to the defendants that what he was doing would violate that right. The defendants cite some cases from other jurisdictions in which it was held as of the – some time in or about the time frame that these events occurred that the presence of a third person, such as reporters, would not rise to the level of a constitutional tort. And among the cases that are relied on showing decisions directly contra were [*Moncrief v. Hanlon*, 10 Med. L. Rptr. (BNA) 1620 (N.D. Ohio Jan. 6, 1984),] where a news media accompanied police into a

search. And the federal court in Ohio objected the holding that there was a constitutional tort stated. [*Higbee v. Times Advocate, Inc.*, 5 Med. L. Rptr. (BNA) 2372 (S.D. Cal. Jan. 9, 1980], to the same effect; and [*Prahl v. Brosamle*, 294 N.W.2d 768 (Wis. Ct. App. 1980)]. And that that is meant to show that there was no clearly established right. The defendants also rely on a more recent case from the Sixth Circuit, [*Bills v. Aseltine* 52 F.3d 596 (6th Cir. 1995)]. And all that is meant to suggest that the right, whatever it was, was not clearly established at the time.

The plaintiffs rely principally on a case from the Second Circuit, [*Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995)], where television reporters seeking on-the-scene coverage of dramatic events had accompanied law enforcement officers inside homes in connection with raids that were being made there. The Second Circuit, Chief Judge Newman writing the opinion – I think I indicated the cite, 35 F.3d 680 – went on to discuss the issue in this case. And he was citing some – actually, March 1992 was the date of the actions in the *Ayeni* case.

And the Second Circuit said [at] 35 F.3d at 686:

> Agent Mottola correctly asserts that there is no reported decision that expressly forbids searching agents from bringing members of the press into a home to observe and report on their activities. He therefore argues that there was no clearly established rule prohibiting such an act.

The Court says:

> The argument lacks merit. It has long been established that the objectives of the Fourth Amendment are to preserve the right of privacy



> to the maximum extent consistent with reasonable exercise of law enforcement duties. And that in the normal situations where warrants are required, law enforcement officers' invasion of privacy of a home must be grounded on either the express terms of a warrant or the implied authority to take reasonable law enforcement actions related to the execution of the warrant. Mottola exceeded well established principles when he brought into the [Ayeni] home persons who were neither authorized by the warrant to be there nor serving any legitimate law enforcement purpose by being there. A private home is not a sound stage for law enforcement theatricals.

The unreasonableness of Mottola's conduct in Fourth Amendment terms is heightened by the fact that not only was it wholly lacking in justification based on the legitimate needs of law enforcement, but it was calculated to inflict injury on the very value that the Fourth Amendment seeks to protect, the right of privacy. The purpose of bringing the CBS camera crew into the [Ayeni's] home was to permit public broadcast of their private premises, and thus to magnify needlessly the impairment of their right to privacy.

In [*Buonacore v. Harris*, 65 F.3d 347 (4th Cir. 1995)], a case just decided in the last two months by the Fourth Circuit, we have some interesting parallels. There the opinion was written by Judge [Motz] of the circuit. The two law enforcement officers, after obtaining a warrant to search a home, invited a private person to engage in an independent general search of the home for items that were not mentioned in the warrant. Apparently it was a

telephone company operator looking for tools or equipment. And an action was brought by the homeowner alleging violations of his civil rights, and the defense of qualified immunity was offered. Summary judgment was moved, and it was refused by the trial court, and the appeal was dismissed by the Fourth Circuit, but there is ample discussion in the case about the qualified immunity issue and whether bringing along a private person to aid in a search would pass muster under the Fourth Amendment. And it is clearly the decision of [the court that] whether or not there was a cause or action that could go forward obviously depend[ed] on whether the specific right violated was clearly established at the time.

The Fourth Circuit discussion, as I was saying, gets into a great deal of consideration of general warrants and whether in effect bringing in a private person as part of a specific warrant in effect breached the clearly established right of someone not to have the privacy of their home breached by someone who was not an official and not acting pursuant to a specific warrant. And if you look at the language in the opinion, there's a great deal of discussion about the importance of the privacy of the home. Just looking randomly at 65 F.3d [at] 355, speaking about James Otis,

> General warrants were not directed solely at authorized officers acting on behalf of the government but could be executed at the request of anyone. And because they had constituted an improper invasion, indeed annihilation of a person's cherished right to privacy, particularly in his own house, they were objectionable.



And going on at page 356:

> Similarly, the special protection to be afforded to person's right to privacy within his own home has also been continuously and consistently recognized by the Court.

And the Court essentially goes on to talk in terms of specific warrants in that case and finds that apparently despite other cases that were analogous such as the ones at hand, that even if there were no cases reported directly on point that would not be enough to prove that the right was not clearly established.

"Clearly established," said the Court of Appeals, "in this context includes not only specifically adjudicated rights but those manifestly included within more general applications of the core constitutional principle invoked, the right to be free from government officials facilitating a private person's general search of the sort Buonacore alleges was conducted here is manifestly included within core Fourth Amendment protection."

And then most importantly at footnote seven of the opinion, there's a discussion of the [*Ayeni*] case by the Fourth Circuit, and this just being a few months ago. It is indicated that the *Ayeni* decision was not squarely on point, but it was deemed sufficiently analogous. And that certainly suggests that the Fourth Circuit was sympathetic to the [*Ayeni*] analysis.

Well, having considered these facts, the Court, first of all, determine[s] whether or not there was any objective reason for the media people to be present. And the Court determines that there clearly would have been a specific right, a constitutional right to be free from unreasonable

searches and seizures. And whether you add the invasion of privacy or trespass element to it, the fact it there was a constitutional right it be free from unreasonable searches and seizures, and the presence of a media officer or media individual is not serving any legitimate law enforcement purpose.

The question then becomes whether that right was clearly established as of April 1992 when this matter occurred. If you look at *Buonacore*, of course, that's a case that arose as of November [1992], although it was just decided. And the Second Circuit and in my view the Fourth Circuit understand that there are certain core rights involving the Fourth Amendment that are abridged regardless of whether there are either no cases that go contra or, frankly, if there are a few cases that go contra as there were here, the Ohio and California and Wisconsin cases. Because in the Court's view, there is a core constitutional right here, to be free from unreasonable searches and right here, to be free from unreasonable searches and seizures, and that was clearly established as of April of [1992] when these events took place.

Frankly, I think you can analyze this as a breach of the requirement for a specific warrant. That what you've got here are people who are operating, if not directly in aid of a – and in a way, one could argue that they were trying to operate in aid of law enforcement. But to the extent that they weren't, they were in the house, snooping around, looking around, participating in one fashion or another with both the search of the premises for the individual, who was not found, and the seizure of the Wilsons, who were detained and actually photographed



by the photographer. So that the right was clearly established. And any reasonable officer should have known that what was going on was a violation of a clearly established right.

And it seems to me that, at least for present purposes, one is not able to say whether Layne as the supervisor on this project, although not someone on site, is himself exonerated from liability. The individual officers who were on site, all of them to the extent that they may have been directly sanctioning the presence of the media personnel, could still be liable. I don't know from this record clearly whether any of these officers are or are not responsible for the presence of the reporter on site and whether it does appear that Layne may well be responsible for the reporters on site. But it seems to me that the factual record would have to be developed somewhat more explicitly to determine just what role the individual officers had in bringing the media people along here in order to determine what liability individually any of these individuals may have. Clearly, somebody's got some liability for letting these people come in an perpetrate what is, in my view, a constitutional tort in violation of a clearly established rule.

So I don't know that – I think the problem I've got analytically now is just establishing who is responsible. I don't frankly, as far as Mr. Layne is concerned, Mr. St. Hilaire, to the extent that he was implementing this policy, my suspicion is that he is liable, although maybe you want more to say about that. I think he is certainly as the implementer is. And unless you can persuade me otherwise, I would probably be inclined to grant summary judgment as to him since there's no dispute of fact that he

implemented this policy. As to the others, I just don't know the role that they played in it. And I can't say that their mere presence on site, the mere fact that the media people were there and they were there means that they authorized it. I just don't know based on this record whether they did or didn't.

And, so at this point, I'm prepared to deny summary judgement as to all defendants on that unreasonable search and seizure count and following the media people. Also deny it as to the plaintiffs except perhaps as to Layne since I don't know exactly who's involved to what extent on defendant's side. Do you want to comment on that, Mr. St. Hilaire?

MR. ST. HILAIRE: Yes, Your Honor. Just two things I want to make clear. Your Honor is holding that the statement – well, the allegation that taking the press inside the residence states a Fourth Amendment violation and that it was clearly established in 1992.

THE COURT: That's right.

MR. ST. HILAIRE: Okay. We want to make clear because we have to consult with the solicitor general to determine whether an interlocutory appeal –

THE COURT: My statement is that specifically taking – well, analytically I wouldn't say that it's strictly taking the media in. I think, if you ask my view, more generally taking any unauthorized person into a home violates the Fourth Amendment. Now, we can be more precise about this case and say taking a Washington Post reporter or any media person, whether it's radio, TV – I



mean, you're asking me to expand how far I go. It happens to be newspaper people and photographers. But I think taking media people in certainly to observe, photograph, and do whatever constitutes a violation of the Fourth Amendment. I reason though from a much more general base, which is anybody who's unauthorized, frankly, as I read these cases, would constitute an unreasonable search and seizure. I don't think that you can use the authorization of a warrant to bring in any body for any reason unless arguably you've really got somebody in aid of some sort of an arrest I guess. I don't know. There may be some imaginable circumstances, but they're few and far between. I don't know whether I've answered your question or not.

MR. ST. HILAIRE: Well, no, it's several of your brethren disagreed, which is what the centerpiece of unqualified immunity analysis is. Only that, I guess, now we're on disputed issues of fact as who did what to whom.

THE COURT: Well, I think that's right. Who authorized the presence of the people there? I just don't know on this record that you've got that. I don't know that that's clear. What I do, I think, hear you say if you're relying on that media ride-along policy, if you allow that the language in there does contemplate entries into the home and it does say entries into the house, and you allow that Layne was responsible for the implementation of that policy and permitted this sort of thing to happen, then I think probably you have – they have stated not only a cause of action, but I'm not sure that they're not entitled to summary judgment on that point. What would

[be] the defense once I make my finding that the policy is tortious?

MR. ST. HILAIRE: The policy from the constitution albeit media ride-along policy.

THE COURT: Yes, unconstitutional or at least states a constitutional tort.

MR. ST. HILAIRE: Right. And we don't hold the person who actually created this whole policy rather than –

THE COURT: Well, is that person in the case at this point?

MR. ST. HILAIRE: He is not or she is not.

THE COURT: I mean, that person isn't. But it seems to me anybody who implements it is. I don't think it's a defense to say I was only following orders if that's the way you want to put it. I mean, anybody who participates in the tort is a tortfeasor.

MR. ST. HILAIRE: Within the chain of command.

THE COURT: Within the chain of command. This man happens to have been named, and that's why I think as to him they've stated not only a cause of action, but unless you can tell me otherwise, I think they're probably entitled to summary judgment as to him.

MR. ST. HILAIRE: Well, the only thing I can say is Layne assigned the group. He got his orders from headquarters that say assign media people to your various groups, and that's what he did.



THE COURT: Well, I don't know if that's a defense. I mean, as I say, if he participated in a constitutional tort, he's liable and others may be as well. And so unless I hear otherwise from you in the next minute or two, I would be prepared to grant summary judgment on that count as to Layne and not as to the others for the reasons indicated, that we don't have the factual basis about their authorization. And frankly, I don't know frankly that, as a practical matter, how this issue gets tried. In terms of the other defendants, I'm not sure how you would prepare to try this issue, the factual issue of who's responsible for this and whether people – there's obviously a factual issue about whether these folks authorized it or were merely on site when it happened.

MR. ST. HILAIRE: Can we have one moment to talk to each other?

THE COURT: Yes.

MR. ST. HILAIRE: We'll also have – consult with Stuart Nathan because we are taking the brunt of this now and we believe we're not the only ones responsible to determine whether or not at this point if judgment is entered whether the third party the Washington Post because they are, you know, an indispensable party here.

THE COURT: Well, the issue of course is you've got a damage component to this.

MR. ST. HILAIRE: I'm sorry, Your Honor.

THE COURT: You've got a damage component to this as well so I don't know what you want to do about that. Unless you feel you've got an immediate appeal on the call of denial of qualified immunity.

MR. ST. HILAIRE: We have an immediate appeal on the

THE COURT: You probably do, yes.

MR. ST. HILAIRE: That's correct. In determining whether or not this case goes forward even on liability or whether there are disputed issues of fact. If this issue comes up, we take it up to the Fourth Circuit, it will divest the Court of all jurisdiction on that specific claim, which is something we need to consult with the solicitor general.

No. 98-83



In The

# Supreme Court of the United States

October Term, 1998

CHARLES WILSON, GERALDINE WILSON and RACHEL SNOWDEN, next friend/mother of VALENCIA SNOWDEN, a minor,

*Petitioners,*

vs.

HARRY LAYNE, JAMES A. OLIVO, JOSEPH L. PERKINS, MARK A. COLLINS, ERIC E. RUNION and BRIAN E. ROYNESTAD,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

## BRIEF FOR PETITIONER

*Of Counsel*:

STEVEN R. SHAPIRO
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500

ARTHUR B. SPITZER
American Civil Liberties Union of the National Capital Area
1400 20th Street, N.W.
Washington, D.C. 20036
(202) 457-0800

DWIGHT H. SULLIVAN
American Civil Liberties Union of Maryland
2219 St. Paul Street
Baltimore, MD 21218
(410) 889-8555

RICHARD K. WILLARD
*Counsel of Record*
DAVID H. COBURN
JAMES S. FELT
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000

RICHARD SELIGMAN
601 Indiana Avenue
Suite 910
Washington, D.C. 20004
(202) 745-7800

*Attorneys for Petitioners*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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## QUESTIONS PRESENTED

1. Whether law enforcement officers violate the Fourth Amendment by allowing members of the news media to accompany them and to observe and record their execution of a warrant?

2. Whether, if this action violates the Fourth Amendment, the officers are nonetheless entitled to the defense of qualified immunity?

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## OPINIONS BELOW

The *en banc* opinion of the United States Court of Appeals for the Fourth Circuit is reported at 141 F.3d 111. The panel opinion is reported at 110 F.3d 1071. The district court's oral opinion is unreported.

## JURISDICTION

The judgment of the Court of Appeals was entered on April 8, 1998. The petition for a writ of certiorari was filed on July 7, 1998, and granted on November 9, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

## STATEMENT OF THE CASE

### A. Statement of Facts

In early 1992, the United States Marshals Service instituted "Operation Gunsmoke," a nationwide fugitive

apprehension program conducted with the cooperation of various state, county, and municipal law enforcement agencies. The Montgomery County (Md.) Sheriff's Office participated in the program pursuant to a Memorandum of Understanding executed by Sheriff Raymond Kight dated February 12, 1992. *See* Joint Appendix ("J.A.") 15-20. The memorandum provided: "It is agreed that no mention will be made to the press about 'Operation Gunsmoke' until a joint press statement can be prepared at the culmination of the operation." J.A. 20.

Notwithstanding this specific prohibition, respondent deputy U.S. Marshal Harry Layne, the Washington, D.C. area site supervisor of "Operation Gunsmoke," assigned a male reporter and female photographer from the *Washington Post* to the "Operation Gunsmoke" team that raided petitioners' home on April 16, 1992. Court of Appeals Joint Appendix ("C.A.J.A.") 129. The team consisted of respondents deputy marshals Joseph Perkins and James Olivo and Montgomery County Sheriff's Office deputies Eric Runion and Mark Collins. Appendix to Petition for Writ of Certiorari ("Pet. App.") 4a.

The team drove the reporters around with them for approximately two weeks. Pet. App. 4a. The reporters were, according to Perkins, "welcome to do what the press does." C.A.J.A. 129 (Perkins Depo. at 49). They were instructed by the officers "where to place themselves and what to do for their safety," but no limitations were placed on what "he [the reporter] was writing or recording or what she [the photographer] was photographing." C.A.J.A. 83 (Olivo Aff. at 6).



On April 14, 1992, the Circuit Court for Montgomery County, Maryland issued three bench warrants for the arrest of Dominic Jerome Wilson based upon charges of violation of probation. The warrants permitted "any duly authorized peace officer" to arrest Dominic Jerome Wilson. No mention of media personnel was made in the warrants. *See* J.A. 34-39.

On the morning of April 16, 1992, respondents drove the reporters to the home of petitioners Charles and Geraldine Wilson believing that Dominic Jerome Wilson, petitioners' 27 year-old son, lived there. Pet. App. 68a. He did not, in fact, live there. C.A.J.A. 94.

At approximately 6:45 a.m., respondents Perkins, Olivo, and Collins led the reporter and photographer to the front door of the Wilson home. Runion covered the back door with respondent Roynestad, who was not normally part of the "Operation Gunsmoke" team, but was assisting them that morning. Pet. App. 68a-69a.

Charles and Geraldine Wilson were lying in bed when they heard loud knocking on their front door. Their nine year-old granddaughter, Valencia Snowden, had just been dropped off by her mother to wait for her school bus and was also in the house. Pet. App. 68a-69a; C.A.J.A. 84-85, 96.

The Wilsons heard Valencia going to the front door and called out to her to see what was going on. She did not respond and the knocking continued. Concerned, Mr. Wilson got out of bed to investigate. C.A.J.A. 97.

When Mr. Wilson reached his living room he was confronted by Perkins, Olivo, and Collins, who were

standing in his living room with their guns drawn. The reporters were with them. They were all dressed in plain clothes and did not identify themselves as law enforcement officials. Pet. App. 5a, 21a, 69a; C.A.J.A. 92-93, 100-103.

Mr. Wilson raised his hands in the air and was ordered in foul and abusive language to get down on the floor. His wife entered the living room as he was complying with this order. The officers questioned the Wilsons concerning the whereabouts of Dominic, the Wilsons' adult son. Mr. Wilson told the officers that he was not Dominic, that Dominic did not live there, and that he had not seen Dominic for at least two weeks. Mrs. Wilson identified Mr. Wilson as her husband, "Charlie Wilson," and confirmed that Dominic was not there. Pet. App. 69a-70a; C.A.J.A. 87-89.

Just prior to entering the house, the officers and media personnel reviewed an arrest worksheet and photographs of Dominic Wilson that showed him to be 27 years old, 185 pounds, and clean-shaven. On April 16, 1992, Mr. Wilson was 47 years old, weighed 220 pounds and had a beard that was almost completely white. Pet. App. 64a.

Perkins cursed at and threatened to arrest Mr. Wilson if Dominic were found in the house. He then searched the home while Collins opened the back door of the house to let in deputy sheriffs Runion and Roynestad. Nobody else was in the house. Pet. App. 5a, 69a; C.A.J.A. 101, 102-03.

The reporter and photographer remained in and participated in the search of the Wilson home without the consent of the Wilsons. As the district court found, the



reporter and photographer "were in the house, snooping around, looking around, participating in one fashion or another with both the search of the premises for the individual, who was not found, and the seizure of the Wilsons, who were detained and actually photographed by the photographer." Pet. App. 77a. Mr. Wilson was wearing underpants and Mrs. Wilson was wearing a sheer nightgown throughout the encounter, including while they were being photographed. The photographer also took photographs of Mr. Wilson being forcibly detained, belly-down on his living room floor with Olivo's knee in his back and gun to his head. At no time were the Wilsons permitted to cover themselves decently. Pet. App. 4a-5a; 21a-22a, 63a-64a, 69a, 70a; C.A.J.A. 91, 106.

Respondents were never told that they could or should take the media with them into private homes and were aware of no authority that permitted them to do so. C.A.J.A. 131-32. It also is admitted that the press were not present in the Wilson home on April 16, 1992 to assist in the accomplishment of any law enforcement purpose:

> Q. Well, the press – on April 16, 1992, they were not assisting you as law enforcement officers in any way, were they?
>
> A. No.

C.A.J.A. 119 (Collins Depo. at 157).

After the officers and reporters left the house, the Wilsons were able to locate Dominic at his girlfriend's apartment. They instructed him to walk to a nearby police station to turn himself in, which he promptly did. C.A.J.A. 81.

**B. Procedural History**

The Wilsons brought a *Bivens* action in the District Court of Maryland alleging, among other things, that respondents' police-led media invasion of their home violated their Fourth Amendment right to be secure there against unreasonable searches and seizures.[1]

Respondents moved for summary judgment on qualified immunity grounds. The district court denied the motion, relying primarily on *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995), and *Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995). The district court found that the police-led media intrusion in this case violated well-established Fourth Amendment principles and that a reasonable officer would have known that bringing the media into a private dwelling without consent was unlawful. The district court further determined

[1] The Wilsons also asserted claims under 42 U.S.C. § 1983. Those claims were dismissed by the district court because respondents were found to be acting under color of federal law, not state law. The district court also granted respondents' motion for summary judgment on the Wilsons' *Bivens* claims that respondents (1) lacked probable cause to enter their home and (2) used excessive force. The Wilsons moved for entry of final judgment as to those claims under Federal Rule of Civil Procedure 54(b) so that they could appeal all of the district court's rulings together with respondents' appeal of the denial of qualified immunity. The motion was opposed by respondents and denied by the district court. Accordingly, all of these issues remain before the district court along with the Wilsons' trespass and invasion of privacy claims against the United States under the Federal Tort Claims Act. Pursuant to that Act, the United States was substituted for respondents as defendant as to the Wilsons' common law claims.



that the media participation in the search of the Wilson home served no legitimate law enforcement purpose. *See* Pet. App. 66a-78a.

Respondents brought an interlocutory appeal. In a 2 to 1 decision, a panel of the Court of Appeals reversed the district court. The majority found that a reasonable officer would not necessarily have understood that bringing the media into a private dwelling to observe the execution of a warrant violated any clearly established right. *See* Pet. App. 51a-65a.

Petitioners filed a timely petition for rehearing and suggestion for rehearing *en banc*, which was granted. Oral argument was held before the *en banc*-court on September 30, 1997. Judge Donald Russell, the dissenting judge on the original panel, subsequently died. The case was argued *en banc* a second time on March 3, 1998. The final vote of the court was 6 to 5 to reverse the district court. *See* Pet. App. 1a-50a.

The majority defined the specific right alleged to be violated as the Wilsons'

> Fourth Amendment right to avoid unreasonable searches and seizures resulting from the officers' decision to permit members of the media who were not authorized to execute the warrant to enter into a private residence, without the homeowners' consent, to observe and photograph the execution of an arrest warrant.

Pet. App. 8a. The question before the court, then, was "whether in April 1992 this right was clearly established and whether a reasonable officer would have understood that the conduct at issue violated it." *Id.* The Court did

not address whether the underlying conduct violated the Wilson's Fourth Amendment rights.

The majority's analysis began with the observation that the reporters did nothing that the officers themselves could not have done consistent with the terms of the arrest warrant. The Fourth Circuit then concluded that

> reasonable officers under these circumstances had no clearly established law from the Supreme Court, this court, or the Court of Appeals of Maryland from which they necessarily understood that they exceeded the scope of an arrest warrant by permitting reporters to engage in activities in which they themselves could have engaged consistent with the warrant.

Pet. App. 9a-10a.

Further, the majority found,

> even if we were to agree with the Wilsons that in 1992 it was clearly established that the Fourth Amendment was violated if officers permitted third parties who were not expressly authorized by the warrant and who were not assisting reasonable law enforcement efforts related to the execution of the warrant to accompany them into a residence, we could not conclude that it was clearly established that the conduct in which these officers engaged manifestly fell within the ambit of that rule.

Pet. App. 10a. According to the majority, a reasonable law enforcement officer could have believed that having the media along served a legitimate law enforcement purpose related to the execution of the warrant. A five-member plurality of the Court hypothesized that, for example,



having the media present might afford protection by reducing the chance that a target of a warrant will resist arrest in the face of recorded evidence of his actions, or improve public oversight and thus deter crime and improper police conduct. Pet. App. 10a.[2]

Judge Murnaghan wrote a dissenting opinion in which four other members of the Court joined. The dissenters found that it has long been established that the permissible actions of a police officer executing a warrant are limited to those strictly within the bounds set by the warrant or reasonably necessary to achieving its execution. The dissenters concluded that since no reasonable officer could have believed that allowing reporters into the home or allowing them to take pictures was either authorized by the arrest warrant or reasonably necessary to accomplish its legitimate law enforcement objective, respondents were not entitled to qualified immunity.

## SUMMARY OF ARGUMENT

This Court has repeatedly held that the privacy of the home is entitled to special protection under the Fourth Amendment. Respondents' decision to invite the media into petitioners' home, while acknowledging that the

[2] Judge Widener did not join the portion of the majority opinion providing these examples of what the plurality viewed as legitimate law enforcement purposes in furtherance of the execution of the warrant that a reasonable officer could have believed were served by the media's presence. *See* Pet. App. 17a (Widener, J., concurring). Thus, only five of the eleven judges joined this part of the opinion.

presence of the media was unrelated to any legitimate law enforcement purpose, violates this core constitutional principle.

The existence of a warrant is not a *carte blanche* for law enforcement officials to do whatever they want. Indeed, as this Court has noted, the Fourth Amendment was adopted largely in response to the British practice of general warrants. Thus, the Fourth Amendment provides that the warrant itself must state with "particularity" the places and things to be searched. More importantly for this case, the warrant provides only a limited privilege for those whose entry into the home is necessary to accomplish the purposes of the warrant.

This Court has often looked to the common law as a guide in interpreting the Fourth Amendment. Here, there is no doubt that respondents' actions would have been considered unlawful at common law, which regarded every unauthorized intrusion into the home as a trespass. Respondents have not and cannot point to any common law tradition that even remotely authorizes their actions in this case.

To the contrary, the common law treated the home as a castle and a sanctuary from prying eyes. In defining the privacy interest that underlies the Fourth Amendment, many of the English cases later relied on by the framers of the Fourth Amendment therefore focused on protecting one's private affairs from public disclosure. *See, e.g., Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763). That concept of privacy is simply irreconcilable with the notion that law enforcement officials may bring the media along to



record and report what transpires inside a home whenever a warrant is executed.

Because of the unique position occupied by the home, this Court has consistently applied the accepted rule that a government intrusion not authorized by a warrant is presumptively unreasonable. The news media search in this case was clearly not authorized by a warrant. By respondents' own admission, it is equally clear that the media were not present in the Wilson home to assist in accomplishing the arrest.

Any *post hoc* speculation that bringing the media inside a home may serve a legitimate law enforcement interest is irrelevant and unpersuasive. The argument that accurate reporting leads to deterrence of crime, for example, could justify the media's presence at any government activity, no matter how intrusive. In addition, it would logically allow the police to bring anyone and everyone with them into a private home.

The Fourth Circuit's qualified immunity standard was overly generous to respondents. Under *Anderson v. Creighton*, 483 U.S. 635 (1987), the unlawfulness of respondents' conduct need only be apparent in light of preexisting law. The Fourth Circuit's standard in effect required the Wilsons to point to a factually indistinguishable case in order to overcome the qualified immunity hurdle.

If the Fourth Circuit had analyzed the constitutional issue, it would have realized that fundamental principles apply with obvious clarity to respondents' conduct. From

the early days of the common law to the present a government official authorized to intrude into a private residence was only authorized to take actions reasonably related to accomplishing the purpose that justified his intrusion.

On the facts of this case, moreover, the unlawfulness of respondents' conduct is made even more apparent by the humiliating circumstances under which the Wilsons were observed and photographed.

## ARGUMENT

### I. RESPONDENTS VIOLATED THE FOURTH AMENDMENT BY BRINGING THE NEWS MEDIA INTO THE WILSON HOME

The home more than any other place provides the individual a sanctuary from which the public eye can be excluded except under the most compelling justifications and safeguards. This is not only because, as a historical matter, "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed," *United States v. United States District Court*, 407 U.S. 297, 313 (1972), but also because "[a]t the very core of [personal privacy] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961). It is for this reason that "over the years the Court consistently has been most protective of the privacy of the dwelling," *Wyman v. James*, 400 U.S. 309, 316 (1971), and has afforded "the sanctity of private dwellings . . . the most stringent Fourth Amendment



protection." *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976). It is for this reason that the Court has declared that in no other setting is "the zone of privacy more clearly defined than when bounded by the physical dimensions of an individual's home – a zone that finds its roots in clear and specific constitutional terms: 'The right of the people to be secure in their . . . houses . . . shall not be violated.' " *Payton v. New York*, 445 U.S. 573, 589-90 (1980).

On April 16, 1992, as the Wilsons lay in bed, respondents brought members of the news media into their home to observe and record what, at 6:45 in the morning, was bound to be, and turned out to be, a humiliating encounter. The media were not brought inside to help respondents apprehend Dominic Jerome Wilson – the reason respondents themselves were entitled to be there. As the district court found, the media's presence bore no relationship at all to accomplishing the lawful purpose that justified any intrusion on the Wilsons' privacy and property rights. By inviting the media into the Wilson home, respondents therefore violated a very basic and easy-to-understand right that has been established for centuries – the right to keep strangers out of our houses who have no business being there. Indeed, there are very few rights that are more clearly established in our constitutional tradition.

### A. The Framers Regarded Any Intrusion Into The Home As Unlawful Unless Specifically Authorized

That an individual has the right to bar any and all strangers from his home who are not authorized by law to enter is a principle older than the common law itself.[3] In *Entick v. Carrington*, 19 How. St. Tr. 1029 (K.B. 1765), a case this Court has called a "monument of English freedom" "undoubtedly familiar" to "every American statesman" at the time the Constitution was adopted,[4] Lord Camden declared that "every invasion of private property, be it ever so minute, is a trespass" for which the trespasser is liable "though the damage be nothing." *Id.* at 1066. In order to escape this liability, the trespasser bore the burden of proving "by way of justification, that some positive law has justified or excused him." *Id.* If the law recognized no justification, "the silence of the books [was] an authority against the defendant, and the plaintiff must have judgment." *Id.*

The "silence of the books" establishes respondents' liability in this case. The utter lack of authority to bring strangers into petitioners' home simply to watch what

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[3] *See* Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 13-18 (Da Capo Press 1970) (1937) (tracing the "immunity that the law has thrown around the dwelling house of man" to biblical and Roman times); John Kaplan, *Search and Seizure: A No Man's Land in the Criminal Law*, 49 Cal. L. Rev. 474, 475 (1961) (recounting that at early common law any unconsented entry onto the land of another was a trespass).

[4] *Boyd v. United States*, 116 U.S. 616, 626 (1886).



happened would have made respondents liable at common law as joint trespassers. The utter lack of authority under a warrant to do so makes them liable as violators of the Fourth Amendment.

The common law at the time of the Fourth Amendment's adoption serves as a baseline for the Fourth Amendment's protection of the home. In *Payton v. New York*, for example, this Court refused to "disregard the overriding respect for the sanctity of the home that has embedded in our traditions since the origins of the Republic" in finding a warrantless felony arrest inside the home unconstitutional. 445 U.S. at 601. Similarly, finding a warrantless search for a fugitive in the home of a third party unconstitutional in *Steagald v. United States*, 451 U.S. 204 (1981), this Court recognized that "the history of the Fourth Amendment strongly suggests that its Framers would not have sanctioned" such a search. 451 U.S. at 220.

A law enforcement official, of course, was privileged to enter a home to effectuate an arrest at common law. *See, e.g.*, 3 William Blackstone, *Commentaries on the Laws of England* 212 (1768). But we are aware of no authority at common law that would have permitted him to invite in an audience simply to watch him in action.

Contemporary courts applying common law principles have reached the same conclusion. In *Anderson v. WROC-TV*, 441 N.Y.S.2d 220, 223 (Sup. Ct. 1981), for example, the court found that "[a]lthough otherwise trespassory conduct may be legalized or justified by lawful authority, such as an officer of the law acting in the performance of his duty, such authority does not extend

by invitation, absent an emergency, to every and any other member of the public, including members of the news media." Similarly, *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. 1980) found that a police officer may be liable for trespass for telling a television cameraman that he could "come forward when the situation was under control." 295 N.W.2d at 782. The court concluded that "Lieutenant Kuenning had no authority to extend a consent to [a television cameraman] to enter the land of another." *Id.; see also Green Valley School, Inc. v. Cowles Florida Broadcasting, Inc.*, 327 So.2d 810, 819 (Fla. Dist. Ct. App. 1976) ("A law enforcement officer is not as a matter of law endowed with the right or authority to invite people of his choosing to invade private property and participate in a midnight raid of the premises").[5]

At common law the media personnel who entered the Wilson home would have been trespassers, and respondents themselves would have been trespassers for having brought them there. *See, e.g.*, W. Page Keeton *et al.*, *Prosser and Keeton on Torts*, § 13, at 72 (5th ed. 1984) (One is liable for trespass not only for entering upon land, but also "by causing a third person to enter"); *accord* Restatement (Second) of Torts § 158 cmt. j (1965) (If an "actor has commanded or requested a third person to enter land in

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[5] *Compare Florida Publishing Co. v. Fletcher*, 340 So.2d 914 (Fla. 1976) (finding constructive consent of homeowner, based upon "custom and usage," to allow media to enter home with fire officials who requested assistance of photographer).



the possession of another, the actor is responsible for the third person's entry if it be a trespass").[6]

In addition, the privilege one possessed at common law to enter the land of another, served only to protect actions taken in furtherance of the purpose for which the privilege was given. *See* Restatement (Second) of Torts ch. 8, at 308 note (privilege to enter land protects those actions "reasonably necessary to the accomplishment of [its] purpose"). Similarly, with respect to warrants, although "a lawful warrant will at all events indemnify the officer, who executes the same ministerially," 4 William Blackstone, *Commentaries on the Laws of England* 288 (1769), in cases where he "makes an ill use of the authority with which the law entrusts him, he shall be accounted a trespasser *ab initio*." 3 Blackstone at 213.

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[6] *See also, e.g., Daingerfield v. Thompson*, 74 Va. 136, 151 (1880) ("There seems, indeed, to be no principle of law better settled, and for which numerous authorities may be cited if necessary, than this: that all persons who wrongfully contribute in any manner to the commission of a trespass, are responsible as principals, and each one is liable to the extent of the injury done."); *Brown v. Perkins*, 83 Mass. (1 Allen) 89, 96-98 (1861) (holding that "aider and abetter" is liable as principal for trespass); *Thompson-Houston Electric Co. v. Ohio Brass Works*, 80 Fed. 712, 721 (6th Cir. 1897) (recognizing that "[f]rom the earliest times, all who take part in a trespass, whether by actual participation therein, or by aiding and abetting it, have been jointly and severally liable for the injury inflicted") 2 Hillard, *Law of Torts* 243 (4th ed. 1874) ("a person who is present at the commission of a trespass, encouraging or exciting the same by words, gestures, looks, or signs, or who in any way or by any means countenances and approves the same, is in law deemed to be an aider and abettor, and liable as principal").

Because of the immunity warrants provided to those who executed them "ministerially," the Framers sought to limit them. *See generally* Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles* 10-17 (1997). Hence, the warrant clause of the Fourth Amendment provides that *no* warrants shall issue unless certain strict standards are met – *i.e.*, probable cause, oath or affirmation, and particularity. In 1859, the Massachusetts Supreme Judicial Court proclaimed that the Massachusetts counterpart to the Fourth Amendment was designed "strictly and carefully to limit, restrain and regulate" warrants. *Robinson v. Richardson*, 79 Mass. (13 Gray) 454, 457 (1859). Judge Thomas Cooley's 1868 treatise on constitutional law states that "the rules of law which pertain to [search warrants] are of more than ordinary strictness." Thomas Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 303 (1st ed. 1868).

The search warrant process was long ago seen as "distressing to the citizen" because of its "humiliating and degrading effects." *Reed v. Rice*, 25 Ky. (2 J.J. Marsh.) 44, 46 (1829). Thus, an official executing a warrant was entitled to immunity only so long as he strictly complied with the warrant. "[I]f the officer serving the warrant exceeded his authority," he "would be responsible for the wrong done." *Commonwealth v. Dana*, 43 Mass. (2 Met.) 329, 337 (1841).

The warrant that respondents possessed in this case only carried with it the implicit authority to enter the home of Dominic Wilson to effectuate his arrest. *See Payton*, 445 U.S. at 602-03 ("an arrest warrant founded upon probable cause implicitly carries with it the limited



authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.") The media personnel brought into his parents' home were not brought there to assist in that arrest. Because the media's presence bore no relationship to accomplishing the purpose that entitled respondents to be in the Wilson home, respondents would have been liable for trespass at common law for having exceeded the scope of their authority under the warrant.

### B. The Framers Were Concerned About Public Disclosure Of Private Information, Which Is A Particular Risk Of Media Intrusion

We seriously doubt, moreover, that the fiercely proud citizens who adopted the Fourth Amendment would have allowed government officials to bring strangers into their houses for the sole purpose of broadcasting to the general public what they observed there. The common law respect for property rights that made "every invasion of private property, be it ever so minute" a trespass encapsulated a still deeper respect for the security of the home and the privacy one enjoys there. The famous language of *Semayne's Case* that "the house of every one is to him as his castle and fortress, as well as for his defense against injury and violence, as for his repose," *Semayne v. Gresham*, 5 Co. Rep. 91a, 92b, 77 Eng. Rep. 194, 195 (K.B. 1604), was echoed by James Otis, Jr., in his opposition before the Superior Court of Massachusetts to the renewal of the writs of assistance that expired after the death of George II:

> Now one of the most essential branches of English liberty, is the freedom of one's house. A man's house is his castle; and while he is quiet, he is as well guarded as a prince in his castle.

2 *Legal Papers of John Adams* 142 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

That houses were castles was a recurrent theme of the commentators on the Constitution in 1787-88, before the Bill of Rights was proposed to the states. The commentators feared the consequences if a right against unreasonable searches and seizures was not included in a Bill of Rights to the Constitution. The Anti-Federalist, "Cato Uticensis," warned, "you subject yourselves to see the doors or your houses, them [sic] impenetrable castles, fly open."[7] Another prominent Anti-Federalist, "Maryland Farmer," called a house "the asylum of a citizen" and "the sanctuary of a freeman."[8] A Federalist newspaper essay, the "Remarks" of "a Foreign Spectator," declared, "If English law holds the dwelling of Wilkes sacred, the federal constitution will equally consecrate yours from violation."[9] The Antifederalists of the Maryland ratifying convention feared that a federal excise

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[7] *Cato Uticensis*, Virginia Independent Chronicle, Oct. 17, 1787, at 1, *reprinted in* 8 *The Documentary History of the Ratification of the Constitution* 75 (Merrill Jensen ed., 1976).

[8] *Essays By a Farmer (I), reprinted in* 5 *The Complete Anti-Federalist* 5 (Herbert J. Storing ed., 1981).

[9] *Remarks on the Amendments to the Federal Constitution . . . by a Foreign Spectator*, The Fed. Gaz. and Philadelphia Evening Post, Oct. 31, 1788, at 3, *quoted in* William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* 1379 (1990) (Ph.D. Dissertation at Claremont Graduate School) (hereinafter "Cuddihy"). Cuddihy's thesis has been called "one of the most exhaustive analyses of the original meaning of the Fourth Amendment ever undertaken." *Vernonia School District 47J v. Acton*, 515 U.S. 646, 669 (1995) (O'Connor, J., dissenting).



would subject "houses, those castles considered sacred by English law . . . to the insolence and oppression of office. . . ."[10]

This Court has also expressed "no doubt" that William Pitt's address before the House of Commons in 1766 "echoed and re-echoed throughout the colonies."

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; but the King of England cannot enter – all his force dares not cross the threshold of the ruined tenement!

*Payton*, 445 U.S. at 601 n.54 (quotation omitted).

This respect for the sanctity of the home made it unlawful for government officials to break into a home in furtherance of a private purpose. In *Semayne's Case*, the King's Bench held that it was unlawful for a sheriff to break into a house at the suit of a common person because

> thence would follow great inconvenience that men as well in the night as in the day should have their houses (which are their castles) broke, by colour whereof great damage and mischief might ensue; for by colour thereof, on any feigned suit, the house of any man at any time might be broke when the defendant might be

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[10] *To the People of Maryland* 2 (1786), *quoted in* Cuddihy at 1546.

> arrested elsewhere, and so men would not be in safety or quiet in their own houses.

*Semayne v. Gresham*, 5 Co. Rep. 91a, 92b, 77 Eng. Rep. 194, 198 (K.B. 1604) (footnotes omitted); *see also* 4 Blackstone at 223 (1769) (breaking into a home was prohibited in civil cases, but allowed in criminal cases because in such cases "the public safety supersede[d] the private").

Similarly, James Otis remonstrated against writs of assistance for not being directed solely to authorized officers.[11] Otis complained that the writs were directed "to every subject in the king's dominions" so that "every one with [a] writ may be a tyrant." 2 *Legal Papers of John Adams* at 142. He complained that not only deputies, "but even their menial servants are allowed to lord it over us." *Id.* Otis described the oppression that would result if writs could be issued at the behest of ordinary citizens:

> What a scene does this open! Every man prompted by revenge, ill humour or wantonness to inspect the inside of his neighbor's house, may get a writ of assistance.

*Id.* at 143.

Opposition to unwelcome intrusions into the home, like those described by Otis, "sprang from a popular

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[11] This Court has characterized Otis's speech as "perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. 'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.' " *Boyd*, 116 U.S. at 625.



opposition to the surveillance and divulgement that [such] intrusion[s] made possible." Cuddihy, at 1546. Those who adopted the Fourth Amendment were concerned about the divulgement of their private affairs to the public – a concern that would have made intolerable the unwelcome presence of people whose sole purpose in being there was to record and broadcast those affairs to a vast audience. This concern can be seen in the major English cases that inspired the Fourth Amendment.[12]

In the famous case of *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763), the attorney for John Wilkes argued that nothing could make up for "the promulgation of our most private concerns, affairs of the most secret personal nature" occasioned by the general search of his home. 98 Eng. Rep. at 490. It was "not proper," he asserted, that Wilkes' papers "be exposed to every eye." *Id.* at 490. Increased damages were sought due to the fact that Wilkes' papers were examined by "very improper persons to examine his private concerns." *Id.* The jury returned a verdict for 1,000 pounds.

In *Beardmore v. Carrington*, 95 Eng. Rep. 790 (C.P. 1764), Beardmore, the victim of a search conducted under a general warrant, charged that his "secret and private affairs" were "made public." 95 Eng. Rep. at 790. By so charging, Beardmore challenged outright the invasion of his privacy, not just the techniques that accomplished that

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[12] *See* Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles* 13 & n.65 (1997) (identifying *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763); *Beardmore v. Carrington*, 95 Eng. Rep. 790 (C.P. 1764); and *Entick v. Carrington*, 19 How. St. Tr. 1029 (K.B. 1765), as three of six such cases).

invasion. As in *Wilkes*, the jury returned a verdict for 1,000 pounds.

In *Entick v. Carrington*, 19 How. St. Tr. 1029 (K.B. 1765), Lord Camden sustained a trespass verdict in favor of the victim of a general warrant. He famously declared that "if this point should be determined in favor of the jurisdiction, the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger." 19 How. St. Tr. at 1063.

These concerns about "promulgat[ing]," "throw[ing] open," and "ma[king] public" information to "a messenger" and "very improper persons" are of the same character as the Wilsons' concerns here. They show a degree of respect for the privacy of persons and inviolability of their property that would not have tolerated a government-led media intrusion into the home. Such an intrusion would have been unlawful at common law and constituted an "unreasonable search" at the time of the Fourth Amendment's adoption.

### C. There Is No Justification For Respondents' Invitation To The Media In This Case

What is apparent from this brief historical discussion is that the chief concern of those who adopted the Fourth Amendment was directed towards unjustified intrusions into the home. It was against the background of a history of lawless entry into a man's home under the guise of authority that the Fourth Amendment was adopted. The right of the people "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" entailed "the right to shut the door on officials



of the state unless their entry is under proper authority." *Frank v. Maryland*, 359 U.S. 360, 365 (1959). It is for this reason that the Court has recognized as "belaboring the obvious" that "private residences are places in which the individual normally expects privacy free of governmental intrusion *not authorized by a warrant*." *United States v. Karo*, 468 U.S. 705, 714 (1984) (emphasis added).

#### 1. The Warrant Did Not Authorize Media Entry Into The Wilson Home

The news media search of the Wilson home was not authorized by a warrant. As this Court has said "time and again," intrusions that occur "outside the judicial process, without approval by judge or magistrate" are "per se unreasonable under the Fourth Amendment." *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993) (quotations and citations omitted). "The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised." *United States v. United States District Court*, 407 U.S. at 317. Respondents had ample opportunity to obtain judicial guidance about the propriety of facilitating an independent news media search, and their failure to do so was not excused by "one of the carefully delineated exceptions" to the warrant requirement. *Dickerson*, 508 U.S. at 372.[13]

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[13] This is not to say that if a warrant had authorized the media's presence the search would have been constitutional. The words of the Fourth Amendment forbid all unreasonable searches and seizures, including those conducted under the authority of a warrant. *See Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931) ("[The first clause of the Fourth

An appreciation of the unique position occupied by the home explains the Court's consistent application of the accepted rule that "a search of private houses is presumptively unreasonable if conducted without a warrant." *See v. City of Seattle*, 387 U.S. 541, 543 (1967). Because of the substantial privacy invasion inevitably occasioned by a search of the home, it is necessary to insist that the justification for the intrusion be strong – *i.e.*, that there is probable cause to believe that the item to be seized will be found in the area to be searched – and that the search be carefully circumscribed to the particular area described and the places in that particular area where the particular items identified could be located. It is also necessary to insist that the probable cause and particularity determinations be made in advance by a neutral and detached magistrate. This ensures that unjustified searches and seizures will not occur and that the scope of the officers' discretion is strictly limited to those actions related to accomplishing the purpose of the warrant. As the Court has said, "The proceeding by search warrant is a drastic one, and must be circumscribed so as to prevent unauthorized invasions of the sanctity of a man's home and the privacies of life." *Berger v. New York*, 388 U.S. 41, 58 (1967) (citations and quotations omitted); *see also Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971) (plurality opinion) ("[A]ny intrusion in

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Amendment] is general and forbids every search that is unreasonable"). The existence of warrant authority might have had an effect on respondents' entitlement to qualified immunity, but it could not have made this search "reasonable."



the way of search or seizure is an evil, so that no intrusion at all is justified without a careful prior determination of necessity. . . . [T]hose searches deemed necessary should be as limited as possible.")

With this in mind, it must be remembered that respondents only possessed arrest warrants that permitted "duly authorized peace officers" to "take Dominic Jerome Wilson" to the Circuit Court for Montgomery County. J.A. 34-39. The Federal Rule of Criminal Procedure that governed their conduct instructed respondents how and by whom arrest warrants "shall be executed": "by a marshal or by some other officer authorized by law" and "by the arrest of the defendant." Fed. R. Crim. P. 4(d)(1) and (3). The outer boundaries of the authority that was conferred on respondents gave them the discretion to do whatever they reasonably felt needed to be done to apprehend Dominic Jerome Wilson. Respondents simply had no authority to do things that bore no relationship to achieving that objective, and bringing the media inside the Wilson home bore no relationship whatsoever to achieving that objective.

The actions of a law enforcement official executing a warrant, in order to be reasonable, must at a minimum be related to achieving the lawful purpose that justifies its existence. This Fourth Amendment principle has well-established common law pedigree. At common law, a privilege to enter the land of another protected the intruder only insofar as his actions were taken in furtherance of the purpose for which the privilege was given. In executing a lawful warrant, an official was protected from individual liability only so long as he remained within the bounds of the authority conferred

upon him or, as Blackstone put it, only so long as he "executes the same ministerially." 4 Blackstone at 288.

Consistent with this long-established common law tradition, "the Fourth Amendment confines an officer executing a search warrant strictly within the bounds set by the warrant." *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 394 n.7 (1971). If this were not so, the express terms of a warrant would become meaningless and the purpose of the Warrant clause frustrated. As Professor Telford Taylor has observed, those who adopted the Fourth Amendment were concerned about overreaching warrants. They viewed a warrant "as an authority for unreasonable and oppressive searches, and sought to confine its issuance *and execution* in line with the stringent requirements applicable to common-law warrants for stolen goods." Telford Taylor, *Two Studies in Constitutional Interpretation* 41 (1969) (emphasis added). Accordingly, a meticulous search for two canceled checks "could not be considered reasonable where agents are seeking a stolen automobile or an illegal still." *Harris v. United States*, 331 U.S. 145, 152 (1947). An officer cannot perform a protective sweep "any longer than it takes to complete the arrest and depart the premises." *Maryland v. Buie*, 494 U.S. 325, 335-36 (1990).

In *Terry v. Ohio*, 392 U.S. 1 (1968), the Court said that "[t]he scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." 392 U.S. at 19 (quoting *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (Fortas, J., concurring)). And, in *Maryland v. Garrison*, 480 U.S. 79 (1987), the Court said that "the purposes justifying a police search strictly limit the permissible extent of the search." 480 U.S. at 87. More



recently, *Horton v. California*, 496 U.S. 128 (1990), provided that "[i]f the scope of the search exceeds that permitted by the terms of a validly issued warrant or the character of the relevant exception from the warrant requirement, the subsequent seizure is unconstitutional without more." 496 U.S. at 140.

Along these same lines, the Court has said that a warrantless search must be "strictly circumscribed by the exigencies which justify its initiation," *Mincey v. Arizona*, 437 U.S. 385, 393 (1978); *Terry*, 392 U.S. at 26, and limited to the extent "commensurate with the rationale that excepts the search from the warrant requirement." *Cupp v. Murphy*, 412 U.S. 291, 295 (1973). In *Arizona v. Hicks*, 480 U.S. 321 (1987), the Court found that picking up a piece of stereo equipment in plain view to examine hidden serial numbers was an unlawful search because it was "unrelated to the objectives of the authorized intrusion." 480 U.S. at 325.

Bringing the media into the Wilson home was "unrelated to the objectives of the authorized intrusion." It was not authorized by the warrant. This Court has consistently and repeatedly admonished law enforcement officials to tailor their conduct to that which is at least related to furthering the purpose that justifies their intrusion in the first place. Since respondents did not invite the media into the Wilson home to assist in the purpose that privileged respondents to be there – arresting Dominic Wilson – the invitation was unreasonable *per se* under well-established Fourth Amendment principles.

### 2. No Law Enforcement Interests Justified Respondents' Invitation To The Media

Respondents do not attempt to argue that the media's presence was in furtherance of the purpose that entitled them to be in the Wilson home. Indeed, they have conceded otherwise, as previously noted:

> Q. Well, the press – on April 16, 1992, they were not assisting you as law enforcement officers in any way, were they?
>
> A. No.

J.A. 119 (Collins depo. at 157). Thus, any "legitimate law enforcement interests" that *might* have been served by having the press along are irrelevant. Given respondents' admission that there was in fact no law enforcement purpose served by the presence of the media in this case, there was no conceivable authority to bring them into the Wilson home.

A plurality of Fourth Circuit judges, however, conjured up two examples of "legitimate law enforcement interests" that a "reasonable officer" might have believed were served by bringing the press along. The examples provided by the plurality are so distant from the purposes that permitted the officers to be inside the Wilson home that, if accepted, they would effectively eliminate any restrictions imposed by a warrant's limited scope, and thus wholly ignore this Court's established prohibition on general warrants. Under the plurality's standard, the carefully limited scope of a warrant becomes meaningless in the face of an officer's – or a court's – *post hoc* speculation that some nebulous law enforcement purpose



would be served by expanding a search beyond the warrant's scope. Such a purpose could always be hypothesized, as the plurality's opinion illustrates.

The plurality first speculated that the officers might have believed that a suspect would behave better knowing that his actions were being recorded. The easy response to this point is that if a reasonable officer actually believed that stillshot photography was necessary to deter misconduct, then the officers themselves might have taken photographs. Having the press, as opposed to the police, take the pictures intensifies the privacy invasion without corresponding gain in advancing a law enforcement purpose. In any event, as the dissent correctly observed, it is "absurd" to suggest that a reasonable officer could have concluded that the media's presence afforded such assistance.[14]

The second "legitimate law enforcement purpose" hypothesized by the plurality was that the media's presence might have been thought to contribute to accurate

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[14] The dissent further explained:

> The reporters might also have helped by carrying the warrant while the officers handcuffed suspects, or by holding the door open for an officer while he was carrying contraband; but to uphold the police actions because of the potential for fortuitous assistance, despite clearly not being designed to serve law enforcement, would make a mockery of the rule that an officer's actions are limited to the scope authorized by the warrant. The exceptions to this strict limitation permit only those actions reasonably necessary to accomplish the purpose of the warrant.

Pet. App. 33a-34a (citations omitted).

reporting of law enforcement activities, which in turn helps deter crime and police misconduct. As important as that media function may be, in this context it is an exception that would effectively swallow the Court's traditional rules regarding the sanctity of the home and the importance of the warrant requirement. The watchdog argument could be used to justify media presence at any government activity no matter how intrusive it is; there is always the "possibility" that a government official will engage in "improper conduct." More realistically, however, this theory is fanciful, for the police simply will not invite the media inside when they plan to misbehave.[15]

Furthermore, if deterrence of criminal misconduct were the measure of things, then the value of the media participation would be linked to how intrusive the police conduct is. The more humiliating the better in terms of deterrence value.[16]

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[15] Further diminishing respondents' watchdog argument is the fact that in many ride-along situations the press agrees to a news embargo before being allowed to accompany law enforcement officials. Deputy U.S. Marshals are advised that "to avoid nasty surprises, make sure both the reporter and his or her editor agree to the embargo. If they don't or won't, consider inviting another media organization." J.A. 8.

[16] The dissent provides an illustration of the problem:

> If, for example, the police officers had a warrant to perform a body cavity search on Mrs. Wilson, the majority implies that they could have believed the warrant authorized them to allow members of the public to watch. . . . Such a search would be patently unreasonable. . . . In today's case the majority finds that it was not clearly unreasonable for a police officer to force at gunpoint a citizen in his underwear to pose for a camera, potentially to be exhibited to the entire viewing readership of the *Washington Post*. This, too, was patently unreasonable.

Pet. App. 41a-42a.



Finally, neither of the "legitimate purposes" that the plurality identified can logically be limited to the media. They could each just as well justify bringing anyone and everyone inside the home with police – a high school civics class, the City Council, the suspect's neighbors, any passerby who is on the street as the police arrive.

In any event, as we have shown, the Wilsons' had an absolute right as old as the common law to keep all strangers out of their house who were not privileged to be there. The media were not privileged to be there and respondents had no authority to bring them there, no matter what government interests might have been furthered by their presence. Respondents' conduct was unlawful the day the Fourth Amendment was adopted and remains unlawful "even if a later, less virtuous age should become accustomed to considering all sorts of intrusion 'reasonable.' " *Dickerson*, 508 U.S. at 380 (Scalia, J., concurring).

## II. RESPONDENTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY

This is not a case where liability is premised on a new constitutional rule or an officer's failure to predict a court's after-the-fact judgment regarding a vague constitutional standard. A clearly established rule required that a law enforcement official's actions in searching a home,

at a minimum, be related to accomplishing the purpose that justified his being there in the first place. Unless exigent circumstances exist, the purpose of an intrusion typically finds its expression in the terms of a warrant, as it did here. Since the media's presence in the Wilson home bore no relationship to accomplishing the purpose of the warrant respondents could not reasonably have believed that they were authorized to bring them there.

### A. The Fourth Circuit's Qualified Immunity Standard Was Overly Lenient

In effect, the Fourth Circuit held that qualified immunity must be granted unless it or this Court had previously issued a decision establishing unconstitutionality in a factually indistinguishable case. The Fourth Circuit relied on an overly generous interpretation of qualified immunity to find petitioners' rights insufficiently established. The court held that

> even if we were to agree with the Wilsons that in 1992 it was clearly established that the Fourth Amendment was violated if officers permitted third parties who were not expressly authorized by the warrant and who were not assisting reasonable law enforcement efforts related to the execution of the warrant to accompany them into a residence, we could not conclude that it was clearly established that the conduct in which these officers engaged manifestly fell within the ambit of that rule.

Pet. App. 10a. In other words, the court of appeals held that this Court's constitutional rule may have been clear as a general matter, but it had yet to be elaborated with



the requisite factual specificity to satisfy the Fourth Circuit's qualified immunity standard, which would require cases specifically establishing that "permitting reporters to observe the events surrounding the execution of an arrest warrant" is unconstitutional.

The Fourth Circuit's qualified immunity standard requires a level of specificity in the articulation of a constitutional right that this Court has already rejected. *Anderson v. Creighton*, 483 U.S. 635 (1987), addressed the question of how particularly defined a right must be in order for it to be "clearly established": "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has been previously held unlawful, but it is to say that in light of preexisting authority the unlawfulness must be apparent." *Id.* at 640 (citations omitted). In *United States v. Lanier*, 117 S. Ct. 1219 (1997), the Court directly addressed the question whether a right that has been defined in general terms, but applied only in factually distinguishable circumstances, can nonetheless clearly establish the law. The Court held that it can.[17] *Lanier*

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[17] *Lanier* arose in the context of a criminal prosecution under 18 U.S.C. § 242, which establishes criminal liability for willful violations of constitutional rights. In defining the level of specificity required to fulfill the due process requirement of "fair warning," *Lanier* expressly equated the Section 242 standard with the "clearly established" standard under qualified immunity law: "[T]he qualified immunity test is simply the adaptation of the fair warning standard to give officials . . . the same protection from civil liability and its

expressly rejected the Sixth Circuit's standard in that case, which was essentially identical to the court of appeals' standard in this case.

*Lanier* explained that "notable factual distinctions between the precedents relied on" and the cases before the court are acceptable "so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *Id.* at 1227. This Court added that "general statements of the law are not inherently incapable of giving fair and clear warning," and "a general constitutional rule already defined in the decisional law may apply with obvious clarity to the specific conduct in question." *Id.* The Court condemned the court of appeals' demand for factually analogous precedents, stating that "all that can usefully be said" is that liability may be imposed only if "in light of clearly established law the unlawfulness is apparent." *Id.* at 1228 (quoting *Anderson*, 483 U.S. at 640).

### B. In Light Of Clearly Established Law, The Unlawfulness Of Respondents' Conduct Was Apparent

The Fourth Circuit should have considered the underlying Fourth Amendment issue first.[18] If they had

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consequences that individuals have traditionally possessed in the face of vague statutes." 117 S. Ct. at 1227.

[18] Last Term, the Court stated that "the better approach is to determine the right before determining whether it was previously established with clarity." *County of Sacramento v. Lewis*, 118 S. Ct. 1708, 1714 n.5 (1998). *County of Sacramento* was issued subsequent to the Fourth Circuit's opinion.



done so, it would have become apparent that fundamental principles require a finding that the conduct here was unconstitutional. For the same reasons, it should have been apparent to respondents that there was no justification for their conduct.

The principles recounted in Part I of this brief were well-settled prior to April 1992 and all apply with obvious clarity to respondents' conduct. From the early days of the common law to the present a government official authorized to intrude into a private residence was only authorized to take actions reasonably related to accomplishing the purpose that justified his intrusion. The media's presence in and search of the Wilson home and photographing of the Wilsons in embarrassing states of undress bore no relationship to accomplishing respondents' purpose in being there.

The Second Circuit came to this very conclusion in *Ayeni v. Mottola*, 35 F.3d 680, *cert. denied*, 514 U.S. 1062 (1995):

> It has long been established that the objectives of the Fourth Amendment are to preserve the right to privacy to the maximum extent consistent with reasonable exercise of law enforcement duties and that, in the normal situations where warrants are required, law enforcement officers' invasion of the privacy of a home must be grounded on either the express terms of a warrant or the implied authority to take reasonable law enforcement actions related to the execution of the warrant.

35 F.3d at 686. *Ayeni* also found that the unreasonableness of bringing the media into a home was

> heightened by the fact that, not only was it wholly lacking in justification based upon the legitimate needs of law enforcement conduct, but it was calculated to inflict injury on the very value that the Fourth Amendment seeks to protect – the right to privacy.

*Id.*

The apparent unlawfulness of respondents' conduct is heightened in this case by the humiliating circumstances under which the Wilsons were detained and photographed. This Court has warned that "responsible officials, including judicial officials, must take care to assure that [searches and seizures that may reveal innocuous, private information] are conducted in a manner that minimizes unwarranted intrusions upon privacy." *Andresen v. Maryland*, 427 U.S. 463, 482 n.11 (1976). Respondents ignored this warning. Their conduct could hardly have been more needlessly destructive of privacy.

Indeed, even in the context of a government facility, a plurality of justices in *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978) (plurality opinion), expressed the view that "[i]nmates in jails, prisons, or mental institutions retain certain fundamental rights of privacy; they are not like animals in a zoo to be filmed and photographed at will by the public or by media reporters, however 'educational' the process may be for others." 438 U.S. at 5 n.2. Two published opinions predating the raid on the Wilson home found that videotaping prisoners against their will for no legitimate penological purpose was unconstitutional. *See Best v. District of Columbia*, 743 F. Supp. 44, 48 (D.D.C. 1990); *Smith v. Fairman*, 98 F.R.D. 445, 450 (C.D. Ill. 1982). This judicial acknowledgment of the privacy



rights of prisoners underscores the obviousness of such a right for people in their homes.

Published federal authority as of April 1992 only condoned third-party involvement in the execution of warrants inside private homes when those parties were acting "in aid of" law enforcement. *See, e.g., United States v. Clouston*, 623 F.2d 485, 486-87 (6th Cir. 1980); *United States v. Schwimmer*, 692 F. Supp. 119, 126-27 (E.D.N.Y. 1988). A federal statute, moreover, provides that "[a] search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, *but by no other person, except in aid of the officer on his requiring it*, he being present and acting in its execution." 18 U.S.C. § 3105 (emphasis added).[19] Federal law respecting the execution of arrest warrants does not even allow for the participation of individuals not authorized to execute the warrant. *See* Fed. R. Crim. P. 4(d)(1) ("The warrant shall be executed by a marshal or by some other officer authorized by law.") Thus, it would have been clear to a reasonable law enforcement official that while it is permissible for law enforcement officials to invite third parties into private dwellings when their assistance is needed, it is impermissible otherwise.

This lesson was not lost on the Sixth Circuit in *Bills v. Aseltine*, 958 F.2d 697 (6th Cir. 1992), the only federal Court of Appeals decision in existence prior to April 1992 that addressed the propriety of an intrusion by a private

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[19] The Second Circuit looked to 18 U.S.C. § 3105 as a "basis for giving content to the [Fourth] Amendment's generalized standard of reasonableness." *Ayeni*, 35 F.3d at 687.

party *not* acting in aid of the law enforcement purpose that entitled law enforcement officials themselves to conduct a search. *Bills* recognized that:

> Police may constitutionally call upon private citizens to assist them, and where assistance is rendered in aid of a warrant, *and not for some other purpose*, the bounds of reasonableness have not been overstepped.

958 F.2d at 706 (emphasis added).

In *Bills*, law enforcement officials executing a search warrant for a generator invited a security guard from General Motors to accompany them to identify stolen General Motors property not mentioned in the warrant. The court found that:

> Officers in 'unquestioned command' of a dwelling may violate that trust and exceed the scope of the authority implicitly granted them by their warrant when they permit unauthorized invasions of privacy by third parties *who have no connection to the search warrant or the officers' purposes for being on the premises.*

958 F.2d at 704 (emphasis added). The Sixth Circuit reversed the trial court's grant of summary judgment for the officers because of genuine issues of material fact regarding the reasonableness of the officers' conduct.

### C. Respondents' Conduct Was Contrary To Reasonable Law Enforcement Practices

Even before *Bills*, the unlawfulness of respondents' conduct was apparent to Raymond Kight, the Sheriff of Montgomery County:



> Q. Has it been your view since you've been the sheriff of Montgomery County that it's been a violation of the – it would be a violation of the constitutional rights of a private resident to have a deputy sheriff bring civilians –
>
> A. Yes.
>
> Q. – into their home?
>
> A. Yes. Now, that – that would be a person on the ride-along program. If you brought in a witness to a crime to identify someone, that may be a different story.

C.A.J.A. 149 (Kight Depo. at 15).

Consistent with that understanding, Sheriff Kight prohibited his deputies – three of whom are respondents here – from engaging in such conduct: "We would never let a civilian into a home. . . . That's just not allowed." C.A.J.A. 147 (Kight Depo. at 10).

Sheriff Kight's policy conforms with what was considered reasonable by the law enforcement community. According to the *Model Rules for Law Enforcement Officers*, a 1974 publication prepared by the Texas Criminal Justice Council in conjunction with the International Association of Chiefs of Police, civilian participation in the execution of a warrant was prohibited unless absolutely necessary:

> No persons other than peace officers, police legal advisors, and members of the district attorney's office shall be permitted to accompany officers in the execution of the warrant, unless absolutely necessary.

Texas Criminal Justice Council, *Model Rules for Law Enforcement Officers: A Manual on Police Discretion* § 4.02

(1974). The comment to this section provided: "Section 4.02 prohibits non-police personnel, such as press and media representatives from accompanying officers." *Id.* at 257. The comment further adds that, unlike the media, "technical experts," such as a locksmith, "have a legitimate reason to go along." *Id.* at 258.

### D. Case Law Addressing Police/Media Home Intrusions Prior To April 1992 Does Not Make The Unlawfulness Of Respondents' Conduct Any Less Apparent

We are aware of three cases predating April 16, 1992 involving police/media intrusions that failed to find a Fourth Amendment violation.[20] Two of the cases are unpublished federal district court decisions, *Moncrief v. Hanton*, 10 Media L. Rptr. (BNA) 1620 (N.D. Ohio Jan. 6, 1984) and *Higbee v. Times-Advocate*, 5 Media L. Rptr. (BNA) 2372 (S.D. Cal. Jan. 9, 1980), and the other is a state intermediate appellate court decision, *Prahl v. Brosamle*, 295 N.W.2d 768, 782 (Wis. 1980).

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[20] We are also aware of two cases where juries returned verdicts against police officers for unreasonable searches due to the presence of the media during the search. *See* Rogers & Callender, *Jurors Award Couple $25,000 in Privacy Lawsuit*, The Capital Times (Madison, Wis.), Jan. 10, 1987, at 3 (reporting that a state court jury found detectives liable "as co-trespassers and that their search was unreasonable in light of the presence of the TV crew"); Umhoefer, *Ripon Police, Newspaper Lose Lawsuit Over Search of Home*, Milwaukee J., Nov. 26, 1986, at 6B (reporting that a federal court jury found that the search constituted "an unreasonable invasion of privacy under Wisconsin law, and a violation of the family's constitutional rights.")



The *Higbee* decision does not mention the Fourth Amendment. It simply asserts that "[t]he right to privacy is only deemed worthy of Constitutional protection in certain circumstances, usually involving gross abuses. . . . " 5 Media L. Rptr. at 2372. (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)). *Moncrief* is no different. It does not cite to a single Fourth Amendment search and seizure case. Instead, it cites to cases involving abortion, contraceptives, and marriage and concludes that the plaintiff's claim does not fall within the federally protected "zone of privacy." 10 Med. L. Rptr. at 1622.

The *Prahl* decision, unlike the other two cases, at least uses the words "reasonable search and seizure." Yet, it too does not bother to cite to a single case involving a search of property, let alone the home. It relies on a case involving male participation in female body searches, *Doe v. Duter*, 407 F. Supp. 922 (W.D. Wis. 1976), and then concludes that the filming of Prahl's residence did not rise to the same level of offensiveness.

These are not Fourth Amendment search and seizure cases. These cases sound in penumbral privacy rights or substantive due process. This Court has since explicitly rejected resort to a substantive due process standard in analyzing claims that law enforcement officials have used excessive force in the course of an arrest. *Graham v. Connor*, 490 U.S. 386 (1989). *Graham* found that "[b]ecause the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive government conduct, that Amendment, not the more generalized notion of 'substantive due process,'

must be the guide for analyzing these claims." 490 U.S. at 395. These cases cannot be squared with *Graham*.[21]

In any event, none of the principles or cases discussed in this brief are even mentioned in those decisions. Their existence cannot make any less clear what has been recounted above or any less apparent the wrongfulness of respondents' conduct. If the balance struck in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), between vindication of constitutional guarantees and the protection of government officials is to be preserved, then such cases can be given no greater weight than if they had gone the other way. That is, just as those cases could not have clearly established the law for qualified immunity purposes, neither can they establish an official's entitlement to qualified immunity. *See Jones v. Coonce*, 7 F.3d 1359, 1362 (8th Cir. 1993) (finding right clearly established despite unpublished district court case not recognizing the right). If the law were otherwise, a single mistaken judge in a remote location could effectively establish immunity for law enforcement officials across the land.

### E. The United States Marshals Service Media Ride-Along "Policy" Is Irrelevant

Respondents claimed in their Brief in Opposition to the Petition that "[t]he most important fact about this

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[21] *See also Soldal v. Cook County*, 506 U.S. 56 (1992) (finding that the Fourth Amendment, not just the Due Process Clauses of the Fifth and Fourteenth Amendments, protects against seizures of property where no privacy or liberty interests are at stake).



case . . . is that respondents were following the terms of a binding and apparently valid policy issued by the U.S. Department of Justice," Pet. Opp'n at 4, and "simply were not at liberty to depart from that policy or to refuse to implement its terms." Pet. Opp'n at 7. This claim is precisely contrary to Respondents' own sworn testimony:

- "I don't know of any authority anywhere about press." C.A.J.A. 132. (Perkins Depo. at 59.)
- "I'm not familiar with the policy with the press." C.A.J.A. 119. (Collins Depo. at 157.)
- Q. "Did you inquire or was there any discussion with Harry Layne, when he instructed you to take the media along with you, whether or not the media would be allowed to go into private residences?"
- A. "There was no instruction." C.A.J.A. 131 (Perkins Depo. at 54.)

The uncontroverted evidence in the record establishes that Respondents were never aware of the "policy" that they now claim to have been following. In addition, there is no evidence in the record that anybody ever instructed or authorized respondents – either pursuant to a policy or otherwise – to take the media with them into private dwellings without consent.[22] In fact, the Memorandum of Understanding that outlined the mission of

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[22] Again, the record evidence indicates just the opposite. Three of the six Respondents in this case are Montgomery County deputy sheriffs. The Sheriff of Montgomery County, Raymond Kight, testified under oath that it was the policy of the Montgomery County Sheriff's Department never to let civilians who were not providing law enforcement assistance into private

"Operation Gunsmoke" prohibited respondents from taking the press with them at all: "It is agreed that no mention will be made to the press about 'Operation Gunsmoke' until a joint press statement can be prepared at the culmination of the operation." J.A. 20.

Although Respondents' sworn testimony and the Memorandum of Understanding are fatal enough to respondents' claim that they were "just following a policy," that claim is also undermined by the actual language of the document that they call a "Justice Department policy." To begin with, by its very terms, the document is not a "policy." It refers to itself simply as a "booklet" describing "considerations that are important in nearly every ride-along." J.A. 4.[23] The final paragraph of the booklet advises marshals to call the "Office of Congressional and Public Affairs" with any media ride-along questions not addressed and concludes: "We will make every effort to help you plan for a most successful ride-along." J.A. 14. This document, trumpeted as a "binding

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homes: "We would never let a civilian into a home or anywhere else where we have a person that – that's in custody. . . . That's just not allowed." C.A.J.A. 147. Sheriff Kight also testified that his deputies knew better than to allow civilians participating in ride-alongs inside people's homes: "My deputies knew not to do that. And I would believe that the homeowner, if that happened, you know, would have some measure of grievance that that occurred." C.A.J.A. 148.

[23] A complete copy of the booklet is included in the Joint Appendix here. Only every other page of the booklet was included in the Joint Appendix before the court of appeals and we reproduced it in that form in Petitioner's Reply in Support of the Petition for Writ of Certiorari. The booklet, however, was placed in the record in its entirety before the district court.



Justice Department policy" that Respondents "simply were not at liberty" to disobey, is actually nothing more than a media relations guide prepared by the Office of Congressional and Public Affairs.

The existence of this media ride-along booklet, moreover, is really beside the point. The Wilsons have no quarrel with "media ride-alongs" or with an informational booklet providing suggestions on how to conduct them. The Wilsons' sole complaint – and the sole issue raised by the questions presented here – is with officers bringing the media inside private residences without the occupants' consent. The media ride-along booklet nowhere authorizes or instructs deputy marshals to do this. The only language in the booklet upon which respondents relied in their Brief in Opposition to the Petition to justify their conduct in this case is this sentence: "If the arrest is planned to take place inside a house or building, agree ahead of time on when the camera can enter and who will give the signal." J.A. 7. This lone reference hardly amounts to a binding order to respondents to take the press with them into a home without the occupants' consent and is perfectly consistent with the Wilsons' view that no members of the media should have been allowed to enter their home until the media had received "the signal" that the Wilsons had indeed provided that consent.

Respondents also neglected to point out language in the booklet that undercuts their argument that they were somehow authorized or instructed to do what they did here. For example, the booklet describes as "essential" the establishment of ground rules and advises deputy marshals to convey those ground rules to reporters. Two

ground rules that the booklet specifically identifies are those addressing "what can be covered with cameras and when" and "any privacy restrictions that may be encountered." J.A. 7.

Notwithstanding respondents' efforts to create the contrary impression, there was no tension between the exercise of their duties and their obligation to comply with the Constitution.

## III. CONCLUSION

Respondents violated the Wilsons' Fourth Amendment rights by allowing members of the news media to accompany them and to observe and record their execution of a warrant inside the Wilson home without the Wilsons' consent. They are not entitled to qualified immunity because clearly established Fourth Amendment principles would have made the unlawfulness of their conduct apparent to a reasonable officer. Accordingly, the



judgment of the court of appeals should be reversed and the case remanded for trial.

Respectfully submitted,

*Of Counsel*:

STEVEN R. SHAPIRO
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500

ARTHUR B. SPITZER
American Civil Liberties Union of the National Capital Area
1400 20th Street, N.W.
Washington, D.C. 20036
(202) 457-0800

DWIGHT H. SULLIVAN
American Civil Liberties Union of Maryland
2219 St. Paul Street
Baltimore, MD 21218
(410) 889-8555

RICHARD K. WILLARD
*Counsel of Record*
DAVID H. COBURN
JAMES S. FELT
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000

RICHARD SELIGMAN
601 Indiana Avenue
Suite 910
Washington, D.C. 20004
(202) 745-7800

*Attorneys for Petitioners*

No. 98-83

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

CHARLES WILSON, GERALDINE WILSON, and RACHEL SNOWDEN, next friend/mother of VALENCIA SNOWDEN, a minor,

*Petitioners,*

v.

HARRY LAYNE, JAMES A. OLIVO, JOSEPH L. PERKINS, MARK A. COLLINS, ERIC E. RUNION, and BRIAN E. ROYNESTAD,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## BRIEF FOR FEDERAL RESPONDENTS HARRY LAYNE, JAMES A. OLIVO, and JOSEPH L. PERKINS

RICHARD A. CORDRAY
*Counsel of Record*
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

*Counsel for Federal Respondents Harry Layne, James A. Olivo, and Joseph L. Perkins*

63pp

## QUESTIONS PRESENTED

1. Whether law enforcement officers violate the Fourth Amendment by allowing members of the news media to accompany them and to observe and record their execution of a warrant?

2. Whether, if this action violates the Fourth Amendment, the officers are nonetheless entitled to a defense of qualified immunity?

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## INTRODUCTION

The Court granted *certiorari* in this case and in *Hanlon v. Berger*, No. 97-1927, to address both the Fourth Amendment issue and the qualified immunity issue.

The Court's ruling on the Fourth Amendment issue will break new ground on whether officers act reasonably by permitting certain third parties to accompany and observe them as they execute a warrant. At issue here is the execution of a warrant to make an *arrest* — itself a highly public event with highly public consequences. Petitioners' generalized reliance on colonial common-law cases involving trespass claims and the long-defunct practice of issuing general warrants cannot obscure the fact that the contours of the specific right they assert here under the Fourth Amendment — however the Court may resolve the issue for the first time in this case — were not "sufficiently clear that a reasonable official would understand that what he [was] doing [in April 1992] violate[d] that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Indeed, the Court should uphold qualified immunity here on the same basis as in *Mitchell v. Forsyth*, 472 U.S. 511, 533 (1985).

At the time respondents acted, courts had uniformly upheld the lawfulness of allowing news media to accompany officers to observe and record them executing a warrant. The Court has never addressed the issue of third parties accompanying officers as they execute a warrant. Judges continue to disagree about whether this conduct violates the Fourth Amendment, and no precedent had "clearly established" such a violation when respondents acted. In these circumstances, the Court should reaffirm that public officials simply "cannot be expected to predict the future course of constitutional law." *Procunier v. Navarette*, 434 U.S. 555, 562 (1978).

## COUNTERSTATEMENT OF THE CASE

### A. Operation Gunsmoke.

This case arose out of Operation Gunsmoke, a federal initiative approved in early 1992 by then-Attorney General William Barr. Operation Gunsmoke was a special apprehension

program in which U.S. Marshals worked with state and local police to apprehend dangerous criminals — in particular, armed fugitives who were charged with or convicted of crimes involving violence with weapons. Nationwide, the program resulted in 3,313 arrests in 40 metropolitan areas. *See* Paul W. Valentine, *For Fugitives, End of Freedom Dawns Suddenly; Early Morning Raids by Marshals Exploit the Element of Surprise*, WASH. POST, May 1, 1992, at D1 (attached as Appendix hereto) (hereafter "Valentine").

On April 14, 1992, the Circuit Court for Montgomery County, Maryland issued three bench warrants to arrest Dominic Wilson (the son of petitioners Charles and Geraldine Wilson), who had violated probation on previous convictions of robbery, theft, and assault with intent to rob. *See* J.A. 34-39. Dominic Wilson qualified as a violent offender under the program. *See id.* at 40 (warrant worksheet caution description reads: "RESISTS/ASSAULTS POLICE/ARMED"). A team unit of Deputy U.S. Marshals and local sheriff's officers was formed to try to execute the arrest warrants. J.A. 47-48.

At the time, the U.S. Marshals Service had adopted a written policy permitting members of the news media to "ride along" with officers to observe and record their activities. *See* J.A. 4-14. As the policy explains, "[r]ide-alongs . . . are simply opportunities for reporters . . . to go along . . . on operational missions so they can see, and record, what actually happens." *Id.* at 4. Pursuant to the terms of the policy, a reporter and photographer from the Washington *Post* were allowed to ride along with the team unit to observe and record the execution of various warrants (including these), over a two-week period. *Id.* at 50-51; Pet. App. 4a. The policy has since been amended to prohibit media ride-alongs. *See* J.A. 22-33; *id.* at 26.[1]

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[1] Petitioners suggest that allowing a two-week media ride-along seems inconsistent with the "press embargo" imposed in the Memorandum of Understanding for Operation Gunsmoke. *See* Pet. 2, 45-46. The ride-along, however, was operating under similar rules, as recommended in the policy, *see* J.A. 7-8, and no article was published until after the program concluded. *See* Valentine, *supra* (App.).



**B. The Execution of the Arrest Warrant.**

On the morning of April 16, 1992, the team unit executed an arrest warrant for Marc Wilson, Dominic's brother, who stated that Dominic resided at the Rockville, Maryland address given in his police reports and court records, and that Dominic was there the night before. J.A. 48-49; *id.* at 40.

The sheriff's computer had "caution indicators" suggesting that Dominic Wilson was armed, had carried concealed weapons, and had assaulted police officers. J.A. 40, 48. Aware of that information, the team unit proceeded to the Rockville address, accompanied by the two newspaper personnel. At approximately 6:45 a.m., the officers secured the rear of the residence and then approached the front door, which was closed but not latched. An officer drew his gun, crouched by the door, and knocked several times. A small child answered. When the officers realized that she was just a child, they pointed their weapons away from her, asked her to come outside, and removed her to a safe location. J.A. 49; E.R. 79-82.[2]

Two officers then entered and heard a male voice. They were concerned that they could not see the person, that it was dark inside, and that their position near the door made them vulnerable. (The area by the door, known as the "fatal funnel," is where most fatal entry incidents occur.) They conducted a quick security sweep, at which point a man came into view. Both officers were unsure of the man's identity at that point. One of the officers identified himself and told the man to freeze and to place his hands where they could be seen. The man, who was cursing and irate, was slow to comply and the officers ordered him to get down on the floor, so that they could gain control of the situation and identify him. The man continued to be verbally abusive and uncooperative and was restrained. At this point, a woman appeared and told the man to settle down and control himself. J.A. 49-50; E.R. 79-82.

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[2] "E.R." refers to the Excerpts of Record, which were filed as the joint appendix in the Court of Appeals below. The child was later identified as Valencia Snowden, and she is also a plaintiff in this case.

The man and woman were then identified as Charles and Geraldine Wilson, Dominic's parents, and the house was identified as their residence. Other officers had entered in the meantime, along with the two newspaper personnel, who observed and took photographs. An officer continued the security sweep of the residence, but nobody else was there. When questioned, the Wilsons said they did not know where Dominic lived and had no way to contact him. Respondents were inside for less than ten minutes. Soon thereafter, Dominic Wilson turned himself in. J.A. 49-51; E.R. 79-82.

The newspaper personnel did nothing more than accompany the officers and observe and report on their actions. They were not involved in executing the arrest warrant. *See* Pet. App. 70a; *id.* at 4a-5a. After Operation Gunsmoke ended, the Washington *Post* published an article about the program that described how the Marshals had gone about rounding up thousands of hardcore fugitives in a national dragnet. The article did not mention petitioners or include their photographs, which were never published. *See* Valentine, *supra* (App.); Pet. App. 5a n.4.

### C. The District Court Proceedings.

Petitioners sued respondents in their personal capacity for money damages under *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). They also sued for trespass and invasion of privacy; the United States was substituted as defendant on these claims, which remain pending. *See* 28 U.S.C. § 2679(d)(1). No media entities were sued.

Petitioners' *Bivens* claims asserted violations of the Fourth Amendment for: (1) using excessive force; (2) lacking probable cause to believe that Dominic Wilson would be present at the Rockville address; and (3) allowing newspaper personnel to observe and record the officers executing the arrest warrants. J.A. 51. Respondents moved for summary judgment based on qualified immunity. The District Court granted summary judgment on Counts I and II, *id.* at 52-56, but denied it on Count III, *id.* at 66. It began by expressing uncertainty about the differences between this claim and petitioners' common-law claims for trespass and invasion of privacy. *Id.* at 56 ("there



seems to be a lot of state law causes of action mixed in here"). Analyzing the issue under the Fourth Amendment, the court rejected respondents' defense of qualified immunity. *See id.* at 56-65. In doing so, however, the court ignored the only decisions existing at the time respondents acted, which had found no constitutional violation, *see Moncrief v. Hanton*, 10 Med. L. Rptr. 1620 (N.D. Ohio 1984); *Higbee v. Times-Advocate, Inc.*, 5 Med. L. Rptr. 2372 (S.D. Cal. 1980); *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. Ct. App. 1980), and relied instead on *subsequent* decisions in *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1689 (1995), and *Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995).

### D. The Decision by the Court of Appeals.

On interlocutory appeal, a split panel of the Fourth Circuit reversed and upheld respondents' defense of qualified immunity. *See* Pet. App. 51a-65a. The case was then reheard *en banc*.

The full Court of Appeals again upheld respondents' defense of qualified immunity, without deciding the Fourth Amendment issue. *Id.* at 1a-50a. The majority noted that the newspaper personnel merely "observed and photographed what transpired" and were not permitted "to engage in activities that the officers could not themselves have undertaken consistent with the warrant." *Id.* at 5a, 9a. Although petitioners asserted that the media "were not assisting reasonable law enforcement efforts," the majority did not accept this assertion. *Id.* at 10a.[3] Indeed, the majority concluded that even if the officers did not intend for the media to "assist in the actual execution of the warrant," they may reasonably have believed that "permitting

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[3] Petitioners distort the meaning of this passage from the opinion below. They claim the court held that "this Court's constitutional rule may have been clear as a general matter, but it had yet to be elaborated with the requisite factual specificity," a legal standard for qualified immunity that is too strict. Pet. Br. 34-35 (quoting Pet. App. 10a). Instead, the court stated that even if this general rule had ever been announced (which it has not), it is not clear *as a factual matter* that the officers' conduct fit within its contours. Pet. App. 10a; *id.* at 15a-17a.

the reporters to accompany the officers served a legitimate law enforcement purpose." *Id.* at 16a. Noting that the case law at the time uniformly rejected the view that this conduct violated the Fourth Amendment, and stressing that reliance on subsequent case law was "inappropriate," the majority upheld the officers' defense of qualified immunity. *Id.* at 10a-17a & nn.6-11.

The dissenting judges concluded that the officers had violated clearly established law under the Fourth Amendment. They believed that general principles protecting the sanctity of the home and confining officers within the express terms of a warrant were sufficient to overcome the qualified immunity defense, though no more specific decisions had been rendered at the time respondents had acted. *Id.* at 18a-50a.

## SUMMARY OF ARGUMENT

Respondents did not violate the Fourth Amendment by allowing two newspaper personnel to accompany them and observe and record their execution of a warrant. In this case, it is undisputed that respondents properly executed a valid arrest warrant for Dominic Wilson. The newspaper personnel merely observed and recorded their actions and did not themselves engage in any conduct that implicates the Fourth Amendment.

The Fourth Amendment permits officers who are executing an arrest warrant to allow third parties to accompany them to aid in discharging their law enforcement mission. The common practice of allowing members of the public and the news media to accompany officers to observe and record their conduct is reasonable and helps to facilitate effective law enforcement. Publicizing the government's efforts to combat crime enhances public confidence and helps to deter crime. Improving public oversight of police activities through accurate media coverage is also a legitimate function of law enforcement that can reasonably be judged to deter improper conduct by law enforcement officers. In addition, in every case the law enforcement mission is aided by an accurate recording of events.

Petitioners' citation of inapposite cases involving trespass



claims and the defunct practice of issuing general warrants does not establish any constitutional violation here. The Court's Fourth Amendment jurisprudence does not simply track the common law of trespass, and the issues in this case are distant from the concerns that led to a constitutional proscription against the issuance of general warrants. In fact, at the time of the Founding, a felony arrest was a highly public event with pervasive public involvement, and the common-law traditions surrounding it afford no support for the *per se* rule against third-party accompaniment proposed by petitioners.

In this case, in particular, it was reasonable for the officers to allow the two newspaper personnel to accompany them in order to observe and record them executing the arrest warrant. The arrest of a fugitive felon remains an event of significant public importance with highly public consequences. The media personnel were limited to a purely passive role, and respondents were present at all times to monitor their actions. Aside from the entry of the residence, which was legally justified, there was no warrant to search personal papers or effects, and the officers merely made a protective sweep of the premises in pursuing their suspect. If any improper intrusion or disclosure by officers or others were judged to have occurred, it can be redressed under the common law without creating new grounds that will be asserted to suppress evidence in future criminal prosecutions.

In addition, even if the Court were to hold in this case — as a matter of first impression — that the officers violated the Fourth Amendment by allowing newspaper personnel to accompany them as they executed the warrant, respondents are entitled to a defense of qualified immunity. At the time they acted, it was not apparent in the light of preexisting law that their conduct violated the Constitution. Indeed, such legal authority as existed at the time had uniformly upheld the validity of this common practice. Even now, the lower courts remain divided about whether these actions violate the Fourth Amendment at all. The highly abstract principles that petitioners have sought to glean from generally inapposite cases do not make it apparent even in this case how the constitutional issue should be decided. In these circumstances, to require public

officials to gauge future developments in constitutional jurisprudence on pain of personal liability for money damages cannot be reconciled with the purposes of qualified immunity.

## ARGUMENT

### I. RESPONDENTS DID NOT VIOLATE THE FOURTH AMENDMENT BY ALLOWING TWO NEWSPAPER PERSONNEL TO ACCOMPANY, OBSERVE, AND RECORD THEM WHILE EXECUTING THE ARREST WARRANT.

Petitioners seek a *per se* rule that law enforcement officers violate the Fourth Amendment whenever they permit third parties, such as members of the public or the news media, to accompany, observe, and record them executing a warrant, particularly by entering a house without the consent of the residents.[4] The Court should reject this proposed rule and instead perform its standard inquiry into the reasonableness of the officers' actions in properly executing a valid warrant.

#### A. The Arrest Warrant Was Valid and the Officers Executed It Properly in This Case.

The validity of the three arrest warrants issued for Dominic Wilson is not in question. Judge Ruben of the Montgomery County Circuit Court issued the warrants on April 14, 1992. They were addressed to "any duly authorized peace officer" for the State of Maryland to take Dominic Wilson and bring him before the court to answer charges of violating his probation on previous convictions for robbery, theft, and assault with intent to rob. J.A. 34-39. They thus met the only requirements for a proper arrest warrant under the Fourth Amendment: issuance by a neutral and detached magistrate, based on probable cause,

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[4] In occasional asides, petitioners make it clear that the *per se* rule they advocate is to be understood in the strongest possible terms, for "in our view, the Fourth Amendment would not permit news media to be brought into a private home even if a warrant so specified." Pet. 12 n.8; *see also* Pet. Br. 25 n.13 (even the "existence of warrant authority," had it been procured, "could not have made this search 'reasonable'").



and describing with particularity the person to be seized and the reason therefor. *Cf. Dalia v. United States*, 441 U.S. 238, 255 (1979).

The warrants were executed on the morning of April 16, 1992. Respondents proceeded to the Rockville address given as Dominic Wilson's residence in police reports and court records. Less than an hour before, Dominic's brother had confirmed that Dominic resided at this address and was there the night before. The officers thus had ample grounds to execute the arrest warrant at this address and to enter the house. *See, e.g., Payton v. New York*, 445 U.S. 573, 602-03 (1980) ("an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling where the suspect lives when there is reason to believe the suspect is within"). The officers knocked and announced their presence. *See Wilson v. Arkansas*, 514 U.S. 927 (1995). The initial detention of Charles Wilson created "only an incremental intrusion on personal liberty" that was justified to execute the warrant. *Michigan v. Summers*, 452 U.S. 692, 702-03 (1981). Although petitioners have claimed that the officers used excessive force, the District Court rejected this claim. *See* J.A. 55-56. The officers made a general sweep of the premises, which the Fourth Amendment permits to those executing an arrest warrant, either in order to locate the suspect or as a protective sweep. *See Maryland v. Buie*, 494 U.S. 325, 330 (1990). Although it turned out that Dominic Wilson was not present at the time, it has been long settled that officers do not execute arrest warrants at their peril of making a reasonable mistake. *Cf. Pierson v. Ray*, 386 U.S. 547, 555 (1967) ("A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not [attempt an] arrest when he has probable cause and being mulcted in damages if he does.").

#### B. The Newspaper Personnel Did Not Actively Participate in Executing the Warrant and Did Not Conduct Any Search or Seizure.

The newspaper personnel did not actively participate in executing the arrest warrant and did not engage in any conduct

that implicates the Fourth Amendment. *See* Pet. App. 4a-5a, 9a.

In particular, the newspaper personnel did not perform any search or seizure in this case. *Id.* at 9a, 11a n.6 ("the officers here permitted no such general independent search by the reporters"). Indeed, the Court of Appeals relied on this distinction to distinguish its own major precedent cited by petitioners, *Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995). That case involved third parties who accompanied officers and actively participated with the officers by searching for evidence that was not mentioned or specified in the warrant. *See* Pet. App. 11a n.6 (distinguishing *Buonocore* as having "addressed the question of whether a third party, who is not authorized by the warrant to conduct a search, may accompany law enforcement officers in executing a warrant and undertake an independent search for items not described in the warrant"). In such cases, the Fourth Amendment is violated because the third parties are enlisted to engage in conduct that exceeds the scope of the warrant and thus is forbidden to the officers. In this case, however, the members of the news media were neither encouraged nor permitted to engage in any such conduct.

Moreover, under the Court's settled precedents, the officers and the newspaper personnel did not engage in an independent search when they observed and photographed the officers' actions in executing the search warrant. *See, e.g., United States v. White*, 401 U.S. 745, 753 (1971) (defendant "who has no constitutional right to exclude the [officer's] unaided testimony" has no "Fourth Amendment privilege against a more accurate version of the events in question"); *Lopez v. United States*, 373 U.S. 427, 439 (1963) (same); *see also United States v. Caceres*, 440 U.S. 741, 750-52 (1979) (no reasonable expectation of privacy in this situation, which "does not raise any constitutional questions"). Matters that were in plain view could be observed and photographed by the officers or by third parties; this is not a search within the meaning of the Fourth Amendment. *See, e.g., Arizona v. Hicks*, 480 U.S. 321, 325 (1987); *Texas v. Brown*, 460 U.S. 730, 739 (1983) (plurality opinion).

In addition, the photographs taken of the scene did not



constitute a seizure in violation of the Fourth Amendment. Pet. App. 9a. The newspaper personnel did not seize any tangible items; instead, they merely witnessed and recorded what the officers themselves saw and heard as they executed the warrant. The reporting that resulted did not document anything but the events that were already open to observation by the officers. Under *Jacobsen*, again, no seizure occurs within the meaning of the Fourth Amendment because there is no "meaningful interference with a person's possessory interests in that property." 466 U.S. at 113; *see Hicks*, 480 U.S. 321, 324 (1987) (recording serial numbers observed on stereo equipment is not a seizure, for it did not meaningfully interfere with anyone's possessory interest).

Thus, no independent search or seizure occurred here apart from the officers' own actions in executing the arrest warrant.

### C. The Fourth Amendment Permits Officers Who Execute a Warrant to Allow Third Parties to Accompany Them to Aid in Discharging Their Law Enforcement Mission.

Because the officers' own actions in executing the arrest warrant were proper, and they did not permit the newspaper personnel to engage in any conduct that implicates the Fourth Amendment, the only remaining issue to be determined is whether the Fourth Amendment is violated by the mere presence of third parties, such as this reporter and photographer, when officers are properly executing a valid warrant.

The correct legal framework for deciding this issue is the "general touchstone of reasonableness which governs Fourth Amendment analysis," including the manner of executing a warrant. *United States v. Ramirez*, 118 S. Ct. 992, 996 (1998); *see also Summers*, 452 U.S. at 699-700. Applying that standard, the Court has noted that "the specificity required by the Fourth Amendment does not generally extend to the means by which warrants are executed." *Dalia*, 441 U.S. at 257.

Instead, the Court has held that the Fourth Amendment imposes "only three" specific requirements upon the content of

warrants: (1) they must be issued by neutral and detached magistrates; (2) they must be based on probable cause; and (3) they must describe with particularity the search or seizure that is authorized to occur. *Id.* at 255. Beyond these three requirements, the manner of executing an arrest warrant — as with a search warrant — is left initially to the officers' discretion, subject only to judicial review of the reasonableness of their conduct after the fact:

> Nothing in the language of the Constitution or in this Court's decisions interpreting that language suggests that, in addition to the three requirements discussed above, [arrest] warrants also must include a specification of the precise manner in which they are to be executed. On the contrary, it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of [an arrest] authorized by warrant — subject, of course, to the general Fourth Amendment protection "against unreasonable searches and seizures."

*Id.* at 257.

The discretion that officers are afforded when they execute a warrant includes the authority to determine when third parties may accompany them. The warrants in this case, in line with consistent practice in other jurisdictions, were directed only to any "duly authorized peace officer." J.A. 34, 36, 38. It has long been understood, however, that officers who are authorized to serve and execute a warrant have reasonable discretion to allow third parties to accompany them in order to further their law enforcement mission. For example, officers regularly recruit individuals to go along as they execute a warrant inside a home in order to help them identify the objects of the warrant; the courts have routinely held this practice to be consistent with the Fourth Amendment, even though the presence of such persons was not authorized by the warrant. *See, e.g., State v. Klosterman*, 317 N.W.2d 796, 803 (N.D. 1982); *People v. Superior Ct.*, 598 P.2d 877, 881 (Cal. 1979). These permissible third parties may even be individuals with no personal



knowledge of the crime being investigated. *State v. Wade*, 544 So. 2d 1028, 1030-31 (Fla. App. 1989); *United States v. Clouston*, 623 F.2d 485, 486-87 (6th Cir. 1980) (per curiam).

By the same token, law enforcement officers may have other good reasons to allow third parties to accompany and observe their conduct in executing a warrant, even though the third parties are not directly assisting them in that task. It would be appropriate, for instance, for officers to bring colleagues along with them for purposes of supervision or evaluation. *Cf. Crowder v. Sinyard*, 884 F.2d 804, 819 (5th Cir. 1989) ("the presence and participation of additional officers," even unauthorized officers from other jurisdictions who were present "to provide expert guidance" does not "render unlawful an intrusion by other officers who are properly on the scene"). It would also be appropriate for officers to allow an attorney to accompany them who did not assist in executing the warrant but who was likely to be involved in prosecuting any ensuing criminal charges. *See Kelley v. State*, 315 S.E.2d 916, 919 (Ga. App. 1984) (no Fourth Amendment violation where "Assistant United States Attorney was a mere observer" and "did not participate" in the officers' conduct). And it would be appropriate for officers who properly desired to photograph the scene of an arrest to allow third parties to accompany them for that purpose, so that they could concentrate their own efforts and attention on executing the warrant. *See, e.g., Stack v. Killian*, 96 F.3d 159, 163 (6th Cir. 1996).[5]

The rationale for this limited discretion is that the marginal infringement on privacy by having one or a few persons

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[5] In *Stack*, the officers' warrant application actually mentioned that they planned to photograph their execution of the warrant. In our view, it was unnecessary to seek such permission, since these actions do not constitute an independent search or seizure. *See supra* Part IB. But the important holding in the case was that the officers did not need specific authorization to allow a media crew to accompany them in order to carry out this task: "even though the warrant said nothing about" any such third parties, the officers were justified "in permitting the accompaniment of camera personnel." 96 F.3d at 163.

accompany officers who are already lawfully making an entry pursuant to a warrant is negligible compared to the infringement effectuated by the initial entry itself. *See, e.g., Summers*, 452 U.S. at 701-03 (even the forcible detention of an individual "represents only an incremental intrusion on personal liberty" when entry "has been authorized by a valid warrant," which already constitutes "a substantial invasion of the privacy of the persons who resided there"). And this same reasoning has led the Court to hold that making a record of discussions between private citizens and government agents does not violate the Fourth Amendment, *see White*, 401 U.S. at 753, whereas electronic eavesdropping on private conversations may do so, *see Katz v. United States*, 389 U.S. 347 (1967).

At all times, however, the officers executing the warrant are "responsible for appropriately limiting a civilian's role in the conduct of a warranted search." *Commonwealth v. Sbordone*, 678 N.E.2d 1184, 1189 (Mass. 1997). If the third parties present on the scene take an active part in executing the warrant or are permitted to engage in their own independent search or seizure of items not covered by the warrant, then the Fourth Amendment is violated, regardless of whether the officers encouraged or sanctioned their conduct. *See, e.g., Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995) (Fourth Amendment violated when private security officer accompanied police and performed independent search for items not specified in the warrant). *See generally* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 4.10(d) (1996) (law enforcement officers executing a warrant may be accompanied by third parties, but "the non-law enforcement personnel must, in effect, be governed by the same rules as law enforcement personnel in considering their conduct during the search") (quotation omitted).

### D. The Common Practice of Allowing News Media to Accompany Officers and to Observe and Record Their Conduct Is Reasonable and Helps Facilitate Effective Law Enforcement.

In many cases over many years, officers have permitted third-party members of the news media to accompany them and



to observe and record their entry on private premises, for purposes such as to facilitate accurate news coverage or to deter criminals by publicizing their crimefighting efforts. *See, e.g., Rogers v. Buckel*, 615 N.E.2d 669 (Ohio Ct. App. 1992) (media accompanied officers into home); *Magenis v. Fisher Broadcasting, Inc.*, 798 P.2d 1106 (Or. Ct. App. 1990) (same); *Scott v. State*, 559 So. 2d 269 (Fla. Ct. App. 1990) (same); *Miller v. NBC*, 187 Cal. App. 3d 1463 (1986) (same); *Moncrief v. Hanton*, 10 Med. L. Rptr. 1620 (N.D. Ohio 1984) (same); *Anderson v. WROC-TV*, 441 N.Y.2d 220 (Ct. App. 1981) (same); *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. Ct. App. 1980) (same); *Higbee v. Times-Advocate, Inc.*, 5 Med. L. Rptr. 2372 (S.D. Cal. 1980) (same). In none of these cases was such conduct found to have violated the Fourth Amendment. *But see Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995).

On the contrary, officers have been generally understood to exercise reasonable discretion about when it would further their law enforcement mission to permit members of the news media to accompany them in executing a warrant, as long as the officers appropriately limit the media's involvement and do not permit them to engage in any independent search or seizure. Indeed, this common practice mirrors a standard policy in virtually every jurisdiction, which authorizes law enforcement to permit members of the general public to "ride along" with officers and to observe them performing their official duties. The practice of "media ride alongs" is so pervasive, in fact, that some courts long ago found that this nationwide practice already had qualified as a "common custom and usage" under the common law. *See, e.g., Florida Publishing Co. v. Fletcher*, 340 So. 2d 914, 915-19 (Fla. 1976) (allowing media to accompany officers when they enter private property "is a widespread practice of long-standing"), *cert. denied*, 431 U.S. 930 (1977); MARC A. FRANKLIN & DAVID A. ANDERSON, CASES AND MATERIALS ON MASS MEDIA LAW 397 (5th ed. 1995) (court recognized "a common and accepted custom" nationally in 1982 for "reporters and photographers to accompany public officers . . . onto private premises where newsworthy events of general

public interest such as crime, shootings, fires or storms have or are occurring"); Richard Zoglin, *Live on the Vice Beat*, TIME, Dec. 22, 1986, at 60 (referring to "the increasingly common practice of letting TV crews tag along on drug raids").

In these situations, officers can reasonably determine that once they are already making a valid entry onto the premises pursuant to a warrant, the marginal effects of allowing members of the news media to accompany them may be outweighed by the many sound justifications for allowing media to observe and record them executing the warrant. For example, a major objective served by this practice is to publicize the government's efforts to combat crime. Handled with appropriate care, this is a legitimate law enforcement objective, for publicizing the fight against crime is itself a valuable weapon in helping to deter crime. *See, e.g., Aversa v. United States*, 99 F.3d 1200, 1213 (1st Cir. 1996) (referring to need for IRS to "inform the public" so as to "deter violations of the law"). Indeed, the media policy adopted by the U.S. Marshals Service at the time recognized this fact by expressly authorizing "media ride-alongs" as a way to publicize "interesting or important" cases. J.A. 4-5.

Other reasonable objectives may also be served by this practice. The oversight function of the press has been widely remarked, and the presence of third parties could serve in some situations to minimize police abuses and protect suspects. *See, e.g.*, Pet. App. 16a; *cf. People v. Boyd*, 474 N.Y.S.2d 661, 665 (Sup. Ct. 1984) ("the presence of the corroboration witness provides a fair method for augmented assurance that the warrant will not be executed with excess"). In other situations, officers could reasonably determine that the presence of media or other third parties would help to protect the safety of the officers. *See id.* at 15a-16a. Moreover, in many situations, officers are assisted by having photographs and other corroboration to provide "a more accurate version of the events in question." *White*, 401 U.S. at 753; *see Ohio v. Robinette*, 117 S. Ct. 417, 419 (1996) (describing use of "mounted video camera" to record details of routine traffic stop). Disputes in related criminal proceedings, which may also give rise to civil suits, can be resolved by consulting records that provide "the most reliable



evidence possible" of matters in which the officers participated and which they were "fully entitled to disclose." *Lopez*, 373 U.S. at 439; *see United States v. Hubbard*, 493 F. Supp. 209, 230-31 (D.D.C. 1979) (taking photographs that "accurately record the events of the search" is "a good police practice").

It is also "a legitimate function of law enforcement to facilitate accurate reporting on law-enforcement activities." *See* Pet. App. 16a. Indeed, the media ride-along policy of the Marshals Service "indicated that keeping the public informed of the activities of the Marshals Service was a duty of that agency and that media ride alongs advanced that interest." *Id.*; *see* J.A. 4 ("The U.S. Marshals Service, like all federal agencies, ultimately serves the needs and interests of the American public . . . and we depend on the news media to [keep the public adequately informed of what the Service does]"). This Court has likewise noted that public access to otherwise private facts is sometimes justified to "shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." *United States Dept. of Defense v. FLRA*, 510 U.S. 487, 497 (1994). How law enforcement officers are waging the fight against crime is a proper matter of public interest, as even the common law has recognized in fashioning its legal protections for individual privacy.[6] *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980) (plurality opinion) ("especially in the administration of criminal

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[6] *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 652D, comment g ("Included within the scope of legitimate public concern are matters of the kind customarily regarded as 'news,'" including "homicide and other crimes, arrests, police raids"); *id.*, comment f ("Those who commit crime or are accused of it may not only not seek publicity but may make every possible effort to avoid it, but they are nevertheless persons of public interest, concerning whom the public is entitled to be informed," as they constitute "involuntary public figures"). *See also Taylor v. KTVB, Inc.*, 525 P.2d 984, 986 (Idaho 1974) ("The authorities writing in the area of invasion of privacy have all assumed and concluded that reports of governmental action in criminal matters are the legitimate province of a free press.").

justice, the means used to achieve justice must have the support derived from public acceptance of both the process and its results"); *id.* at 604 (Blackmun, J., concurring) ("public has an intense interest and deserved right to know" about "prosecution of local crimes" and "the conduct of . . . police officers").

Indeed, a ruling that law enforcement officers can *never* allow members of the news media to accompany them in order to observe and report on their execution of a warrant would mean that all such activity, which is rife with the potential for abuse, would henceforth occur in secret. This approach would sharply clash with the Court's frequent endorsement of Justice Brandeis' observation that "publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (per curiam) (quotation omitted). The resulting closed regime of law enforcement operations would disserve the core constitutional interests at stake here. And such a strict categorical rule would be inconsistent with the pragmatic "reasonableness" standard that is the touchstone of Fourth Amendment analysis. *See e.g.*, *Ker v. California*, 374 U.S. 23, 33 (1963) ("standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application").

Of course, these reasons do not *require* police to allow third parties, civilian employees, or news reporters to be present at the scene of a police raid. In many instances, officers may judge that it is neither prudent nor desirable to do so. *See, e.g.*, J.A. 4 ("not every operational situation lends itself to a ride-along"). And certainly the press can claim no *right* to be present at the scene. *See, e.g., Branzburg v. Hayes*, 408 U.S. 665, 684-85 (1972) ("Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded."). But the issue here is different and the claim is more modest: officers in particular cases are permitted to exercise reasonable discretion about whether allowing third parties, such as members of the news media, to accompany them merely in order to observe and record them executing a warrant will further their law enforcement mission.



### E. It Was Reasonable for Respondents to Allow Two Newspaper Personnel to Accompany Them to Observe and Record Them Executing the Warrant.

In each case, therefore, in applying the Fourth Amendment it is necessary to examine the reasonableness of the officers' conduct by considering "both the character of the official intrusion and its justification." *Summers*, 452 U.S. at 701.

Here, respondents were executing a valid arrest warrant for Dominic Wilson, a thrice-convicted felon, which authorized a "substantial invasion of privacy" by allowing the officers to seize him, take him into custody, and require him to answer in court on the charges specified. *Id.* The media presence was limited to two people, who accompanied the half-dozen officers executing the warrant. Care was taken to limit the newspaper personnel to a purely passive role that did not include engaging in any independent search or seizure. The officers were present at all times and able to monitor the media's actions, which were subject to controls that prevented any public disclosures until the fugitive apprehension program ended. *See* J.A. 7-8. The alleged crimes which gave rise to the arrest warrant were run-of-the-mill felony charges that did not appear to involve any intensely private or personal matters. In addition, no search warrant authorized any especially sensitive intrusions in this case, such as a strip search or a search involving physical penetration of the body.

On the other side of the scale, respondents could make a reasonable judgment that allowing the two newspaper personnel to accompany them in order to observe and record their actions would be beneficial to their law enforcement mission.[7] These

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[7] As in any case applying the Fourth Amendment, the actual subjective motivations of individual officers are irrelevant to the analysis of whether their conduct was objectively "reasonable." *Scott v. United States*, 436 U.S. 128, 137-38 (1978). The same is true of the legal analysis in Part III, *infra*, concerning the qualified immunity defense. *Crawford-El v. Britton*, 118 S. Ct. 1584, 1592 (1998).

individuals were present to gather news information that the Marshals Service had determined would be useful to their law enforcement mission by helping to publicize their efforts to carry out a nationwide fugitive apprehension program of massive proportions. *See* Valentine, *supra* (App.) (the dragnet effort "resulted in 3,313 arrests in 40 metropolitan areas" and locally resulted in the arrest of "350 fugitives"). This determination was certainly reasonable. At the same time, the media's involvement was likely to promote the aims of law enforcement by ensuring a more accurate understanding of their activities and objectives by the public. *See* Pet. App. 16a; J.A. 4.

The media also observed and photographed the officers' actions in executing the warrant, which created a record that was likely to prove useful as "the most reliable evidence possible" of the events. *Lopez*, 373 U.S. at 439. Indeed, in this case, their eyewitness testimony could have aided in evaluating petitioners' subsequent allegation that respondents used excessive force, which if correct would have been a violation of the Fourth Amendment. *See, e.g., Robinette*, 117 S. Ct. at 421 (use of videotape would aid in resolving fact-specific inquiry into whether "a consent to search may be deemed voluntary"); *United States v. Nicholson*, 17 F.3d 1294, 1296 (10th Cir. 1994) (videotape reviewed to resolve suppression issue).

In the circumstances, therefore, the officers could make a reasonable judgment that the presence of the two newspaper personnel on the premises, observing the execution of the warrant, would be helpful in facilitating the broader goals of effective law enforcement, even though they provided no immediate physical assistance to the officers in making an arrest. *See, e.g., Kelley*, 315 S.E.2d at 919 (no Fourth Amendment violation where Assistant United States Attorney who was permitted to accompany officers "was a mere observer and did not participate" in executing the warrant). For this reason, the court below correctly emphasized that it is crucial to the Fourth Amendment analysis "to understand the distinction between an intent that the reporters assist in the actual execution of the warrant and a reasonable belief that permitting the reporters to accompany the officers served a legitimate law enforcement



purpose." Pet. App. 16a. But the categorical ruling sought by petitioners would not permit such reasonable judgments to be made, and would open up broad new vistas for finding constitutional violations based on whether third parties like news reporters or others were ever permitted to be present and to witness the execution of a warrant. This approach would be completely out of step with the "general touchstone of reasonableness which governs Fourth Amendment analysis." *Ramirez*, 118 S. Ct. at 996.

In the circumstances of this case, therefore, the manner in which respondents executed the arrest warrant was reasonable and did not violate the Fourth Amendment.

## II. PETITIONERS' GENERALIZED DISCUSSION OF AUTHORITIES DOES NOT ESTABLISH A FOURTH AMENDMENT VIOLATION HERE.

Petitioners' argument on the Fourth Amendment issue relies heavily on a generalized treatment of common-law cases from colonial times as support for a *per se* rule against third parties accompanying officers into a residence to execute a warrant. *See* Pet. Br. 14-24. The argument largely ignores the common law of arrests, however, which is most germane to the facts of this case and indicates that felony arrests were regarded as highly public events with pervasive public involvement. Petitioners' authorities, moreover, are inapposite, and do not address the issue of when officers may be accompanied by third parties, such as members of the news media, as they execute a warrant. Indeed, the abstract principles presented by petitioners do not square with some of the Court's recent holdings on the reasonableness of officers' actions in executing warrants.

### A. Colonial Cases Involving Trespass Claims and the Defunct Practice of Issuing General Warrants Do Not Establish Any Fourth Amendment Violation.

Petitioners discuss several cases dating back to the colonial period, which ostensibly support their argument that the officers' conduct in this case was illegal. None of those cases,

however, involved the issue of when third parties may accompany officers to assist in or observe the execution of an arrest warrant, or indeed of any warrant. At most they reinforce the uncontroversial proposition that the Fourth Amendment was explicitly intended to abolish general warrants. Beyond that, however, these older cases addressed very different matters that shed little light on the issues presented here.

The case of *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763), is renowned for having ruled that general warrants are illegal and provide no authority to enter a home and perform a general search for evidence not described with particularity in the warrant. *Wilkes* was a trespass case, decided against the officers and in favor of the victims of a general search, who were alleged to be the publishers of a seditious libel. The case involved a warrant to arrest and search, but the problem that vitiated the authority of the warrant was that it did not specify with particularity the persons to be seized, the places to be searched, or the papers to be seized. *Id.* Instead, it stated only in general terms that the messengers of the Crown were authorized to search for "the authors, printers, and publishers" of a particular pamphlet and to seize them, together with their papers. Under this general warrant, the authorities proceeded to arrest 49 persons in three days and seize extensive amounts of private papers. The court ruled that this nameless warrant was void and illegal. *Id.* at 489-90.

*Entick v. Carrington*, 19 How. St. Tr. 1029 (K.B. 1765), was presented on similar facts, and reached a similar result. Here the offending warrant was specific as to the person, but general as to papers. Again in an action for trespass, the court held that a general warrant does not privilege officers to undertake a general search, and that such warrants, which had their origins in the abhorrent practices of the Star Chamber, were inconsistent with the traditions of the common law. *Id.* at 1069-72. *Beardmore v. Carrington*, 95 Eng. Rep. 790 (C.P. 1764), which also held that a search conducted under a general



warrant was invalid at the common law, is to the same effect.[8]

The Court warmly approved *Entick* and discussed it at length in *Boyd v. United States*, 116 U.S. 616 (1886). That case involved a prosecution for customs fraud, and the defendant disputed the authority of a statute that authorized "a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him." *Id.* at 623. The Court reaffirmed that the Fourth Amendment abolished the practice of issuing general warrants, but also held that any search for "mere evidence," which creates the "forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime" is condemned by the Fourth and Fifth Amendments. *Id.* at 630. The former point remains valid, but the Court has since repudiated the "mere evidence" rule as an "irrational" and "discredited" fiction that became unnecessary and unhelpful after adoption of the exclusionary rule. *Warden v. Hayden*, 387 U.S. 294, 302-04 (1967); *see also id.* at 314-15 (Douglas, J., dissenting) (characterizing the twofold holding in *Entick* as invalidating both general warrants and searches for mere evidence). This significant further development in the law shows the need to treat the broad generalities of the colonial cases with greater caution and precision.

Finally, the older case of *Semayne v. Gresham*, 77 Eng. Rep. 194 (K.B. 1604), is somewhat closer to the mark, though still quite distant. There the court ruled that a sheriff could not forcibly enter a house merely to serve civil process, "for by colour thereof, on any feigned suit, the house of any man at any time might be broke." *Id.* at 198. That situation is concededly distinct, however, from the service of criminal process or the

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[8] The writs of assistance so fervently opposed by the colonists were but a more objectionable form of general warrant, since the vice of lacking particularity was compounded by the virtually unlimited duration of the writs, which remained valid throughout the life of the reigning sovereign. *See, e.g.*, NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 53-54 (1937).

execution of an arrest warrant, which confers greater authority upon the officers. *Id.* at 195. Indeed, no less an authority than Blackstone recognized that in the latter situation, "the public safety supersedes the private." 4 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *223 (1769); *see also infra* Section IIC (discussing common-law authority of officers and private persons to enter houses to arrest felons, with or without a warrant).

Petitioners also cite a number of cases involving warrantless searches. *See* Pet. Br. 24-29. By definition, however, these cases are inapposite, for the issue here concerns the manner in which officers may execute *a valid warrant*. The constitutional inquiry is governed by the reasonableness standard laid down in *Dalia* and *Ramirez*, and must be evaluated against the backdrop of a valid warrant that already has sanctioned an intrusion into private premises. Rather than a freestanding invasion of privacy as occurs in the warrantless cases, therefore, the issue here concerns the marginal effects of conduct ancillary to a proper and "substantial invasion of the privacy of the persons who [reside in the home]" that has been effected under the auspices of the valid warrant. *Summers*, 452 U.S. at 703.

The Court itself has never addressed the issue of who may properly attend or participate in the execution of a warrant. Thus petitioners' wide-ranging search for relevant precedents is unavoidable. Yet the principal authorities that they cite offer little guidance on the issues presented in this case.

### B. The Court's Fourth Amendment Analysis Does Not Simply Track the Common Law.

One of the false postulates of petitioners' argument is their assertion that if a third party makes a nonprivileged entry upon private property, which constitutes a trespass at common law, this same action *ipso facto* creates a violation of the Fourth Amendment. *See, e.g.*, Pet. Br. 14-19. In many cases, however, the Court has made it plain that further developments in the law have rendered this analogy obsolete.

In fact, the Court has held on numerous occasions that



constitutional law on search and seizure does not simply track the common law of trespass or arrest or any other branch of the common law. "The common law . . . made many things unlawful, very few of which were elevated to constitutional proscriptions." *California v. Hodari D.*, 499 U.S. 621, 626 n.2 (1991). One aspect of the peculiar concern at the common law, for example, was to effectuate the established rule that officers were not permitted to search for or to seize "mere evidence" of crime — an archaic and overly restrictive rule that has been repudiated in modern cases applying the Fourth Amendment. *Hayden*, 387 U.S. at 300-10. The common law also was preoccupied with the struggle to curb the controversial practice of issuing "general warrants" to search or arrest, which did not bother to specify the places to be searched, the property to be seized, or the persons to be arrested — a practice that was eliminated by the particularity requirement of the Fourth Amendment. *See, e.g.*, N. LASSON, at 120. These concerns dominate the principal English cases discussed by petitioners, *see supra* Section IIA, but they have nothing in common with the limited issues presented here, where the officers were executing a valid warrant that complied in every respect with the dictates of the Fourth Amendment, *see supra* Section IA.

Moreover, "[t]he premise that property interests control the right of the Government to search and seize has been discredited." *Hayden*, 387 U.S. at 304. By articulating doctrines such as the "open fields" exception to the Fourth Amendment, the Court made it clear long ago that in a great variety of instances no "illegal search or seizure" occurs "even if there had been a trespass." *Hester v. United States*, 265 U.S. 57, 58 (1924). Indeed, the same disjunction can operate in the other direction, as with electronic eavesdropping. In *Katz*, for example, the Court held that the reach of the Fourth Amendment "cannot turn upon the presence or absence of a physical intrusion into any given enclosure," for the analytical underpinnings of that premise, found in earlier cases, "have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling." 389 U.S. at 353. *See also United States v. Karo*,

468 U.S. 705, 712-13 (1984) ("The existence of a physical trespass is only marginally relevant to the question of whether the Fourth Amendment has been violated" because "an actual trespass is neither necessary nor sufficient to establish a constitutional violation.").[9]

Indeed, the Court has often cautioned that there are "important differences between the common-law rules relating to searches and seizures and those that have evolved through the process of interpreting the Fourth Amendment in light of contemporary norms and conditions." *Payton v. New York*, 445 U.S. 573, 591 (1980); *see also Steagald v. United States*, 451 U.S. 204, 217 n.10 (1981). It simply "does not follow that the right to exclude conferred by trespass law embodies a privacy interest also protected by the Fourth Amendment." *Oliver v. United States*, 466 U.S. 170, 183 n.15 (1984). Instead, the proper analysis of whether the Fourth Amendment is violated must apply the Court's modern jurisprudence to the facts presented in each new application that may arise. This task is especially important in an area of the law that the Court has not previously addressed, as is true here where third parties merely accompany officers as they execute a warrant. *See, e.g., Bills v. Aseltine*, 52 F.3d 596, 603 (6th Cir. 1995) ("The full parameters of the role of private citizens in executing . . . warrants has not been completely, or clearly, defined.").

### C. The Common Law of Arrests Does Not Support the Claim of a Fourth Amendment Violation Here.

In any event, if the Court were to look to the common law for guidance on the issues raised in this case, it is necessary to consult the relevant doctrines. Here respondents were executing

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[9] Even if the common law of trespass were viewed as controlling here, the fact that certain courts have held that members of the news media are privileged to accompany officers into private premises based on "common custom and usage," *see supra* Section ID (discussing cases), further indicates that this basis for finding a constitutional violation is problematic at best.



an arrest warrant, not a search warrant, so the proper authorities are those concerning the common law of arrests. The suggestion that this case — in which the officers did not conduct any general search of a home to ransack private papers and effects, but made only a mere protective sweep — is tantamount to British cases disapproving general warrants is an unpersuasive exercise in hyperbole.

Indeed, at the common law it is quite clear that an arrest was a highly public event with highly public consequences. The "fiercely proud citizens who adopted the Fourth Amendment" (Pet. Br. 19) subscribed to common-law principles that greatly empowered all members of the community to participate in the arrest of felons, in order to provide much-needed protection for the public safety. Indeed, in colonial times the enforcement of the law was necessarily a participatory activity, since in almost all British and American jurisdictions the concept of a standing police force was unknown. *See* 3 LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, at 1-7 (1956) (noting that even the word "police" was largely unknown in England in the 18th century). Such a concept was not even seriously discussed until the introduction of the London and Westminister Police Bill of 1785, and no such legislation was enacted until more than forty years later, at the insistence of Sir Robert Peel. *Id.* at 108-09; *see also id.* at 89-107 (discussing the aftermath of the Gordon riots of 1780 and the inadequacy of existing institutions for keeping the peace); *see also* 1 SIR JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 196-97 (1883) ("Nothing could exceed the inefficiency of the [few] constables and watchmen."). For many offenses, in fact, the authorities had determined that given the paucity of public officials to enforce the law, the most effective means of apprehension was a system of public rewards as incentives that would stimulate private citizens to apprehend offenders and bring them to justice. *See* 4 W. BLACKSTONE, at *291-92; 2 L. RADZINOWICZ, at 57-137.

As a result, the common law empowered private persons to arrest felons on virtually the same basis as a crown officer could do so. An arrest warrant could be directed either to a peace

officer or to a private person, and the execution of a warrant by either was equally good. *See* 2 SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN *110 (1678).[10] Even where no warrant had been issued, a private person "had the power to arrest without warrant for a felony, committed in his presence, and for one, actually committed in the past, if he had reasonable ground to suppose that it had been committed by the person whom he arrested." *United States v. Coplon*, 185 F.2d 629, 634 (2d Cir. 1950) (L. Hand, J.); *see also* 1 J. STEPHEN, at 193. *See generally* 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN, ch. 12, §§ 1-27 & ch.13, §§ 27 & 29, pp. 74-79, 85-86 (2d ed. 1724).[11] Early decisions in this country confirmed that the adoption of constitutional restrictions on search and seizure did not disturb the broad arrest powers afforded by law to private persons, which were thought to be "essential to the welfare of society." *Wakely v. Hart*, 6 Binn. 316, 318 (Pa. 1814); *see also Rohan v. Sawin*, 59 Mass. (5 Cush.) 281, 284-85 (1850).

In addition, when making a felony arrest, an officer could command assistance from all able-bodied males over the age of fifteen; every private person so commanded was "bound" to assist and could be lawfully punished for failing to do so. *See* 1 M. HALE, at *581. This practice evolved originally from the "hue and cry," which in medieval times was the means of raising the inhabitants to apprehend a felon, upon pain of amercement if they did not quit their homes to lend their aid. *See, e.g.*, 1 J. STEPHEN, at 184-90; 4 W. BLACKSTONE, at *290-91. Private persons involved in making an arrest were authorized "to resort to the same measures [accorded the officer himself]

[10] At the common law, the only difference was that the officer was bound to execute the warrant or to answer for his failure, whereas a private person was not bound to execute it. *See* 2 M. HALE, at *110.

[11] Here again, the difference was that a private person acted at his peril; if it turned out that no felony had been committed, he could be held liable for his acts. By contrast, an officer was privileged from suit if he acted upon suspicion of felony with reasonable grounds to do so, whether or not the suspicion proved accurate. *See* 2 M. HALE, at *82.



to secure the arrest of the accused," including the use of deadly force where arrest was resisted, and were denominated in the law as *posse comitatus*. Rollin M. Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 227 (1940); *see also* 1 M. HALE, at *588; 2 *id.* at *119; 1 J. STEPHEN, at 193.

Pertaining to the manner of making an arrest, several of these points that were well established at the common law are relevant here. First, as stated above, when officers were executing an arrest warrant, they were authorized to call upon any and all private persons to accompany them and assist in their efforts. 2 W. HAWKINS, ch. 13, § 29, p. 86 ("any one may lawfully assist" an officer executing a sheriff's warrant). Indeed, contrary to the accepted practices of modern law enforcement, private persons were authorized to execute warrants in their own right, whether or not an officer was present or participating at all in the apprehension. 2 M. HALE, at *110. More broadly, private persons were authorized to arrest felons even without a warrant, and could employ all of the same means available to officers in doing so. 1 *id.* at *588.

As for the privacy interests claimed by petitioners here, it is noteworthy that at the common law, both private persons and officers were justified in breaking open doors to enter a house to apprehend a felon pursuant to an arrest warrant, after first announcing their presence. *See* 2 W. HAWKINS, ch. 14, §§ 1-9, pp. 86-87; 1 M. HALE, at *583.[12] Indeed, where the suspect was known to have committed a felony, then he could be taken inside his house by officers or private persons, with or without a warrant, and forcible entry for this purpose was justified. *See* 2 W. HAWKINS, ch. 14, § 7, p. 86; 1 M. HALE, at *588 ("If a felony be committed, and A. suspects B. and B. being in his house refuse to open the doors, or render himself, it seems A.

[12] It bears note that in the same discussion where Lord Hale spells out this broad authority to enter a private house to arrest a felon, he expresses grave doubt about the propriety of executing a general warrant "to search all places, whereof the party and officer have suspicion" — the very practice specifically addressed and proscribed by the Fourth Amendment. 2 M. HALE, at *114.

may break open the doors to take him; and so may the constable, if A. acquaint him therewith"); 2 *id.* at *76-77, 82.[13]

As considered above, *see supra* Section IIB, the common law cannot be accepted uncritically as the baseline for applying the Fourth Amendment. But if the common law is taken as providing some guidance on these matters, it weighs against petitioners here. It hardly can be contended that private persons who could arrest felons on their own initiative without a warrant and even on bare suspicion, who could use force and enter houses to effectuate the arrest of felons, who could execute warrants and had a public duty to assist officers in doing so, would be barred from simply attending and observing officers executing an arrest warrant where the officers had authorized this attendance as a reasonable means of furthering the aims of their law enforcement mission.

On the contrary, at the common law a felony arrest was always regarded as a highly public event with highly public consequences. It involves the "serious step of taking a person into custody for the purpose of prosecuting him for a crime." *Buie*, 494 U.S. at 333. And it is a matter deeply interesting to the public, for if the law is not carried out properly, "malefactors would escape to the common detriment of the people." 2 M. HALE, at *78-79.

### D. Petitioners Have Found No Law Establishing a Fourth Amendment Violation in This Case, But May Press Their Claims Under the Common Law.

In the end, petitioners' treatment of the common-law authorities operates at an unacceptable level of generality that cannot control the issues raised in this case. The proposition that officers executing an arrest warrant are constitutionally

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[13] Blackstone adds the caveat that if a private person acts to arrest a felon upon bare suspicion only, then "he cannot justify breaking open doors to do it." 4 W. BLACKSTONE, at *289-90. In the case at bar, of course, Dominic Wilson was already a thrice-convicted felon who was sought for having violated the terms of his probation.



disabled, upon entering a residence, from taking actions that are not expressly authorized by the warrant and that would violate the common law is overbroad and inconsistent with many of the Court's decisions. In *Summers*, for example, the Court upheld the detention of persons encountered during the search of a home without any explicit authority to do so, though the officers' actions would have constituted a battery or false imprisonment at the common law. 452 U.S. at 701-06. In *Buie*, the Court upheld a protective sweep of the premises without probable cause or express authority, which would not have been permitted at the common law. 494 U.S. at 334-337. And in *Hayden*, the Court held that officers could seize items of clothing that were uncovered during a search of a home but not identified in any warrant, even though the common law did not permit officers to search for or seize "mere evidence" of crime. 384 U.S. at 300-03.

The proper standard, instead, is reasonableness, which again must be applied here in circumstances where the arrest warrant already has sanctioned an intrusion into the home and "a substantial invasion of the privacy of the persons who resided there." *Summers*, 452 U.S. at 703; *see also Ramirez*, 118 S. Ct. at 996. Decisions such as *Dalia* establish that the Fourth Amendment addresses three specific concerns about the kinds of warrants that may be issued and otherwise confers upon officers reasonable discretion to decide how best to execute warrants in a manner that will further their law enforcement mission in particular instances. *See* 441 U.S. at 257. Courts must consider the reasons presented to justify the officers' actions, and assess them against the extent of any intrusion actually effected by the marginal presence of third parties when the warrant is executed.

This fact-specific assessment cannot be performed on the basis of mere dictum or platitudes. For example, if after proceeding to the Rockville address respondents had encountered Dominic Wilson in the street, there is no doubt that they could have arrested him in public, *see United States v. Watson*, 423 U.S. 411 (1976), and there would be no serious issue of a Fourth Amendment violation, even though the media

would have "accompanied" the officers "to observe and record their execution of a warrant." Pet. Br. i. If instead Dominic Wilson had answered respondents' knock on the door and been arrested at that point, the entry of the newspaper personnel onto petitioners' property (though not into the residence) would still be a nonprivileged trespass without consent — thus falling within the rule asserted by petitioners here — but again there would be no serious issue that the Fourth Amendment was violated by their mere presence.

The officers' entry into the house, accompanied by the newspaper personnel, and the specific actions that were taken there, are factors in the necessary calculus to gauge the overall reasonableness of respondents' conduct. But as then-Justice Rehnquist has stated, "the adage that 'a man's home is his castle'" is a general theme that "cannot be accepted as an uncritical statement of black letter law which answers all questions in this area." *Steagald*, 451 U.S. at 229 (Rehnquist, J., dissenting). It particularly cannot be taken to dispose of the issues here pertaining to the common law of arrests, which sanctioned extensive intrusions into the privacy of a residence — by officers and private persons alike — to protect the public safety by facilitating the apprehension of felons.

It is also important to recognize, as the Court has bluntly stated, that "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy.'" *Katz*, 389 U.S. at 350. If law enforcement officers take the proper steps to obtain and execute a valid arrest warrant, and act within the general parameters of reasonableness in carrying out their duties, then the Fourth Amendment requires no more. If petitioners are dissatisfied with the officers' conduct, they can continue to seek redress by pursuing their common-law remedies. For "the protection of a person's general right to privacy — his right to be let alone by other people — is, like the protection of his property and of his very life, left largely to the law of the individual States." *Id.* at 350-51.

Here petitioners have asserted claims for trespass and invasion of privacy against respondents under Maryland law.



*See* Pet. Br. 6 n.1. When common-law claims are asserted against federal officials, they are processed against the United States government and do not subject the individual officers to personal liability for money damages. *See* 28 U.S.C. § 2679(d)(1). These claims, which remain pending before the District Court, are sufficient to protect the privacy interests of individual citizens without reaching out to fashion any supplemental basis for relief, grounded in the Constitution, that would introduce a new basis for excluding material evidence in criminal cases.

Finally, petitioners express concern about the particular risks that media intrusion pose for public disclosure of private information. Pet. Br. 19-24. The law requires the press to be sensitive to these concerns also; the article ultimately published by these newspaper personnel on Operation Gunsmoke, for example, did not even mention petitioners. *See* Valentine, *supra* (App.). But in any event, the subsequent act of publicity gives rise to a very different claim even under the common law, one that has nothing to do with the Fourth Amendment issues raised in this case. *Compare Restatement (Second) of Torts* § 652B (intrusion upon privacy is actionable "if the intrusion would be highly offensive to a reasonable person"); *with id.* § 652D (publicizing of private facts is actionable if the matter publicized "would be highly offensive to a reasonable person" and is "not of legitimate concern to the public"). Indeed, where officers properly execute a valid warrant, and later act improperly by publicizing private information or giving it to the media for publication, their conduct is actionable under the common law or perhaps the Due Process Clause, but it does not retroactively create a violation of the Fourth Amendment. *See, e.g., Baker v. Howard*, 419 F.2d 376 (9th Cir. 1969) (improper release of information by police to radio station is not actionable under federal law); *York v. Story*, 324 F.2d 450 (9th Cir. 1963) (police officer taking nude photographs of assault victim and circulating them to other officers is actionable under Due Process Clause as arbitrary conduct that shocks the conscience), *cert. denied*, 376 U.S. 939 (1964).

## III. IF THE COURT HOLDS THAT RESPONDENTS VIOLATED THE FOURTH AMENDMENT, THEY ARE ENTITLED TO QUALIFIED IMMUNITY BECAUSE THE LAW WAS NOT CLEARLY ESTABLISHED AT THE TIME THEY ACTED.

The ruling below is faithful to the doctrine of qualified immunity that the Court has extended to state and local officials. The Fourth Amendment issue raised here has not been definitively determined by the precedents of this Court or any other court; presents a hotly disputed question on the merits; had been decided in favor of the constitutionality of respondents' conduct in several decisions rendered before they acted; and at the time of their actions had never been decided adversely to such conduct by *any* court *anywhere*. In these circumstances, the Court's precedents provide uniform support for respondents' defense of qualified immunity in this case.

### A. Qualified Immunity Shields Officials from Personal Liability Where the Unlawfulness of Their Conduct Is Not Apparent in the Light of Preexisting Law.

The Court has settled that government officials performing discretionary functions are immune from suit unless their conduct violates "clearly established" constitutional rights about which a reasonable person would have known at the time of the events in question. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). To defeat a defense of qualified immunity, the contours of the constitutional right alleged to be violated "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right," which requires that "in the light of preexisting law, the unlawfulness must be apparent." *Anderson*, 483 U.S. at 640.

The purpose of this doctrine is to alleviate concern that the threat of personal liability for money damages would "'dampen the ardor of all but the most resolute or the most irresponsible'" public officials. *Harlow*, 457 U.S. at 814 (quoting *Gregoire v.*



*Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.), *cert. denied*, 339 U.S. 949 (1950)). Shielding officials from lawsuits that may distract them from their governmental duties has been judged necessary and appropriate to "encourag[e] the vigorous exercise of official authority." *Butz v. Economou*, 438 U.S. 478, 506 (1978); *see also Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

To this end, the Court has developed an objective test for determining whether the law existing at the time "clearly established" that such conduct was prohibited. First, the right at issue must be defined with reasonable particularity, which means that "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that, in the light of preexisting law, the unlawfulness must be apparent." *Id.* In making this determination, which is a pure question of law, a court should "use its 'full knowledge of its own [and other relevant] precedents,'" *Elder v. Holloway*, 510 U.S. 510, 516 (1994), and thus it is proper to look to "the opinions of this Court, of the Courts of Appeals, or of the local District Court" that existed at the time. *Procunier v. Navarette*, 434 U.S. 555, 565 (1978); *see also Davis v. Scherer*, 468 U.S. 183, 192 & n.9 (1984).

Above all, the Court has stressed that officials cannot "reasonably have been expected to be aware of a constitutional right that had not yet been declared." *Procunier*, 434 U.S. at 565. "Such hindsight-based reasoning on immunity issues is precisely what *Harlow* rejected." *Mitchell*, 472 U.S. at 535. "If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow*, 457 U.S. at 818. For these reasons, "[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341. The decision below is consistent with

these principles, which the court applied to uphold respondents' defense of qualified immunity. *See* Pet. App. 6a-17a.

In the circumstances presented here, the proper resolution of the Fourth Amendment issue was not apparent in the light of preexisting law. The Court has not squarely addressed the general issue of when third parties may accompany officers in executing a warrant; indeed, it is going to decide the specific issue involving news media for the first time in this very case. *See, e.g., Bills*, 52 F.3d at 603 ("The full parameters of the role of private citizens in executing search warrants has not been completely, or clearly, defined."). The Fourth Circuit recognized that it had no clear precedent addressing or foreclosing the issue, and that even subsequent decisions from around the country revealed a continuing circuit conflict on the issue. *See* Pet. App. 10a-14a. Against that legal landscape, which will be discussed in more detail below, respondents were entitled to qualified immunity because they "could not reasonably be expected to anticipate subsequent legal developments, nor could [they] fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow*, 457 U.S. at 818.

Nor may a court in this situation saddle public officials with personal liability merely because it may be adamantly persuaded that its own legal judgments should have been obvious on their face to everyone at all times. Government officials lose the shield of qualified immunity only when the unconstitutionality of their conduct would have been apparent "in the light of pre-existing law." *Anderson*, 483 U.S. at 640; *Harlow*, 457 U.S. at 818; *Malley*, 475 U.S. at 341. Only in the most egregious circumstances would it be appropriate to apply a kind of "Nuremberg" reasoning to expose public officials to the prospect of paying money damages out of their own pockets for violations that courts discover in hindsight but that were not clearly addressed or foreclosed by prior precedents. As the discussion in Parts I and II, *supra*, makes clear, however, this is not such a case.



### B. At the Time Respondents Acted, the Courts Had Uniformly Approved Their Conduct, Which Was Common Practice and in Accord with the Marshals Service Policy.

At the time respondents executed the warrant in this case — April 16, 1992 — the scanty case law uniformly held that allowing members of the news media to accompany officers in order to observe and record the execution of a warrant did not violate anyone's constitutional rights. *See Moncrief v. Hanton*, 10 Med. L. Rptr. 1620 (N.D. Ohio 1984); *Higbee v. Times-Advocate, Inc.*, 5 Med. L. Rptr. 2372 (S.D. Cal. 1980); *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. Ct. App. 1980). The court below cited this case law as support for its holding on qualified immunity. Pet. App. 14a n.10. In addition, the court noted that this practice was endorsed by the media ride-along policy of the Marshals Service, which was in place at the time. *See* Pet. App. 4a n.3, 15a-16a; J.A. 4-14.

*Moncrief*, for example, is factually quite similar to this case. There, a husband and wife filed suit under 42 U.S.C. § 1983, alleging that the police entered their house improperly to execute a warrant, accompanied by members of the news media. After the officers entered, they handcuffed the husband, and the media was allowed to photograph him in this state, which caused him embarrassment and humiliation. 10 Med. L. Rptr. at 1620-21. After rejecting the claim that the warrant was invalid, the District Court addressed the plaintiffs' claim that the officers had violated their "right to privacy under the Fourth Amendment by allowing the media to enter their premises along with the police officers and take photographs." *Id.* at 1621. The court found that these allegations did not state a proper claim for the deprivation of any constitutional right, for "the right to be free from unwanted publicity about one's affairs" is protected by the common law, not by the Fourth Amendment, and therefore such conduct does not fall within the "zone of privacy set out in the Constitution as being federally protected." *Id.* at 1622.

Similarly, in *Higbee*, the plaintiffs claimed that their

constitutional rights were violated when law enforcement officials invited the press to be present and to take photographs during the execution of a warrant at plaintiffs' residence. A photograph of the inside of the residence was later published in the newspaper. 5 Med. L. Rptr. at 2372. Rejecting plaintiffs' claim, the District Court held that the constitutional "right to privacy" was not infringed except in cases "involving gross abuses." No such "gross abuse" or independent violation of the protected zone of privacy occurred, however, where police merely allowed members of the news media to observe and record the proper execution of a valid warrant. *Id.* The court dismissed the action, noting that plaintiffs' pendent claim for invasion of privacy under California tort law should be allowed to proceed in the state courts. *Id.* at 2373.

*Prahl* is also very similar to this case. There, a television newscaster heard reports that a SWAT team was called to a residence where shots had been fired. He was allowed to join the officers and to observe and film their actions in entering the residence, confiscating the guns, and interviewing the suspect. A story on the incident ran on the local television news later that day. The suspect, who was never charged, sued the officers and the newscaster under section 1983, alleging that his constitutional rights were violated "by an unreasonable search and seizure" and by "the filming and broadcasting of that search and seizure without his consent." 295 N.W.2d at 773-74. The trial court dismissed this claim, and the court of appeals affirmed, stating that it was "unwilling to accept the proposition that the filming and television broadcast of a reasonable search and seizure, without more, result in unreasonableness." *Id.* at 774. The court ruled, however, that plaintiff's claim for trespass against the officers and the newscaster would be permitted to proceed on remand to the trial court. *Id.* at 778-82.

These decisions establish that at the time respondents acted, the courts had uniformly rejected claims that their actions violated the Fourth Amendment or any other provision of the Constitution. *See also Scott v. State*, 559 So. 2d 269, 272 (Fla. App. 1990) (rejecting motion to suppress evidence where sheriff's deputies "permitted a television crew to enter the home



during the execution of the warrant," finding no violation of the Fourth Amendment). Instead, allegations of injury to reputation or privacy interests stemming from such conduct were understood to be appropriately addressed under the common law in the state courts. *Cf. Paul v. Davis*, 424 U.S. 693, 699-712 (1976) (such matters are actionable under state tort law, not the United States Constitution).

In addition, at the time the Marshals Service had adopted a "media ride-along" policy that endorsed the practice of having officers allow "reporters and camera crews to go along with Deputies on operational missions so they can see, and record, what actually happens," so that "the media receive an accurate picture of how the Marshals Service operates." J.A. 4. In this case, a reporter and photographer from the Washington *Post* were permitted to ride along with Operation Gunsmoke personnel for about two weeks, in order to observe and report on the nationwide fugitive apprehension program. Pet. App. 4a. It was recognized, consistent with the contents of the policy, that they would observe actual fugitive apprehensions, including the possibility of arrests "planned to take place inside a house or building." J.A. 7; *see id.* at 4. The policy, which presented the formal position of the Marshals Service with respect to such activities, was facially valid and had never been challenged or criticized by any court. Its existence thus reinforces the fact that the law at the time was not understood to establish, let alone "clearly establish," that respondents' conduct in this case violated the Fourth Amendment.

On the contrary, the existence of the Marshals Service policy itself provides strong support for respondents' claim that they are entitled to qualified immunity in this case. *See, e.g., Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994) (officers were entitled to qualified immunity for implementing established policy upheld in one previous case and never before held unconstitutional), *cert. denied*, 115 S. Ct. 1097 (1995); *Sullivan v. Town of Salem*, 805 F.2d 81, 87 (2d Cir. 1986) (if officers "were simply implementing an established policy of the town, then they would have available to them a defense of qualified immunity from personal liability"); *Wallace v. King*, 626 F.2d

1157, 1161 (4th Cir. 1980) (qualified immunity is proper where officers followed longstanding, though unwritten, policy laid down by superiors and not found improper by any court), *cert. denied*, 451 U.S. 969 (1981).

### C. At the Time Respondents Acted, No Court Had Ever Held or Indicated that Their Conduct Violated the Fourth Amendment.

At the time respondents acted, no controlling decision and indeed no decision by *any* court *anywhere* in the country had ruled that their actions were unlawful. All of the cases that have reached such a result *postdated* their conduct. In this posture, the court below correctly upheld their defense of qualified immunity. *See* Pet. App. 13a ("Reliance on decisions issued after the events underlying this litigation . . . is inappropriate.").

In particular, the dissent below relied on *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1689 (1995). Pet. App. 43a-44a. This reliance is improper. *See, e.g., Parker v. Boyer*, 93 F.3d 445, 447 (8th Cir. 1996) (pointing out that because the *Ayeni* decision was not rendered until "after the police in this case executed their search, [it] cannot weigh in the balance against a finding of qualified immunity"), *cert. denied*, 117 S. Ct. 1081 (1997). Even the District Court's ruling in *Ayeni* postdated the actions at issue here. *See Ayeni v. CBS*, 848 F. Supp. 362 (E.D.N.Y. 1994).

On the basis of the Court's square holding in *Mitchell v. Forsyth*, 472 U.S. 511, 533 (1985), reliance on subsequent decisions is improper and requires reversal. In that case, as here, the plaintiff alleged a violation of his constitutional rights based on the Fourth Amendment. The specific complaint in *Mitchell* was that federal officials had wrongfully authorized a wiretap on the plaintiff's telephone. Two years after those actions had taken place, the Supreme Court had ruled that such conduct was unlawful and violated the Fourth Amendment. *See United States v. United States Dist. Ct.*, 407 U.S. 297 (1972). At the time of the acts at issue, however, only two courts had addressed it. Both were federal district courts, and both had upheld the legality of the wiretaps in unpublished opinions. *See*



*Mitchell*, 472 U.S. at 533 (citing *United States v. Dellinger*, No. 69 CR 180 (N.D. Ill. Feb. 20, 1970), *rev'd*, 472 F.2d 340 (7th Cir. 1972); *United States v. O'Neal*, No. KC-CR-1204 (D. Kan. Sept. 1, 1970), *app. dismissed*, 453 F.2d 344 (10th Cir. 1972)). Within days after the officials authorized the wiretap challenged in *Mitchell*, two other federal courts had held such conduct to be illegal, but those decisions postdated the events in question. *See* 472 U.S. at 533.

Accepting the federal officials' defense of qualified immunity, the Court held that in light of the two unpublished decisions extant at the time, to say that the contrary position "had already been 'clearly established' is to give that phrase a meaning that it cannot easily bear." *Mitchell*, 472 U.S. at 535. Under *Harlow*, "officials performing discretionary functions are not subject to suit when such questions are resolved against them only after they have acted," for this "hindsight-based reasoning on immunity issues is precisely what *Harlow* rejected." *Id.* "The decisive fact is not that Mitchell's position turned out to be incorrect, but that the question was open at the time he acted," as shown by the fact that the Supreme Court itself intervened to decide the issue two years later. *Id.*

The holding in *Mitchell* is decisive in favor of respondents' claim to qualified immunity in this case. *See* Pet. App. 13a ("Reliance on decisions issued after the events underlying this litigation, whether the decisions were decided by this court or others, is inappropriate.") (citing *Mitchell*). Several decisions at the time had rejected claims that such conduct violated federal constitutional rights, and no decision had accepted such a claim. The Court has granted *certiorari* to address the issue for the first time in this case and in *Hanlon v. Berger*, No. 97-1927. And the Court has repeatedly admonished the lower courts that public officials "cannot be expected to predict the future course of constitutional law." *Procunier*, 434 U.S. at 562..S. at 343, 341). In recent years, departures from this admonition have been grounds for summary reversal. *See Hunter v. Bryant*, 502 U.S. 224 (1991) (per curiam). It is equally clear that qualified immunity should be afforded in this case.

### D. Relevant Decisions and the Debate Here Show that It Is Not Apparent, Even Now, that Respondents Violated the Fourth Amendment.

It is also pertinent that the proper resolution of the Fourth Amendment issue presented in this case plainly is not obvious, even today, to many of the federal and state judges who have grappled with it. The most direct indication of this uncertainty is the Court's decision to grant *certiorari* and decide the Fourth Amendment issue in this case and in *Hanlon*, which spawned sharply conflicting decisions in the courts below.[14] *See Mitchell*, 472 U.S. at 534 (finding it significant for purposes of qualified immunity that "this Court found the issue sufficiently doubtful to warrant the exercise of its discretionary jurisdiction" to decide it and give it "the definitive answer that it demanded"). And Parts I and II, *supra*, discuss in detail all the reasons why respondents' conduct in this case does not violate the Fourth Amendment at all.

The lower courts are still divided on the underlying constitutional issue, seven years after the events of this case. In *Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997), the panel split on the issue. The two Judges Arnold held that it was not "self-evident that the police offend general fourth-amendment principles when they allow members of the news media to enter someone's house during the execution of a search warrant." *Id.* at 448. Judge Rosenbaum, concurring separately, concluded that admitting representatives of the news media into the home without securing the resident's express consent did violate the Fourth Amendment. *Id.* at 448 (Rosenbaum, J., concurring). But all three judges found that the

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[14] In *Hanlon*, the District Court accepted the officers' defense of qualified immunity, judging that the law was still evolving on the Fourth Amendment issue, but a panel of the Ninth Circuit reversed. *See Berger v. Hanlon*, 129 F.3d 505 (9th Cir. 1997), *cert. granted*, No. 97-1927. In this case, the District Court found that the officers had violated the Fourth Amendment and rejected their defense of qualified immunity, but a panel of the Fourth Circuit reversed, and the full court sitting *en banc* agreed with the panel. *See* Pet. App. 3a & n.2.



officers were entitled to qualified immunity, since even the most recent decisions "would appear to us to indicate at most only the beginnings of a trend in the law." *Id.* at 447 (majority opinion).

Similarly, in this case the majority of the *en banc* court stated that "reasonable jurists can differ" on the Fourth Amendment issue posed here. Pet. App. 14a. They noted, in particular, that "reasonable officers may have perceived that permitting the reporters to accompany them served a legitimate law enforcement function." *Id.* at 15a. Judge Murnaghan and the other dissenting judges strenuously disagreed, though they acknowledged that the Marshals Service at the time had adopted a "media ride-along policy" to govern situations where members of the news media would accompany officers to observe and report on their actions. *Id.* at 21a (Murnaghan, J., dissenting).

Other courts have now held that law enforcement officers violate the Fourth Amendment when they allow members of the news media to accompany them and to observe and record their execution of a warrant. *See, e.g., Hagler v. Philadelphia Newspapers, Inc.*, 1996 WL 408605, Civ. No. 96-2154 (E.D. Pa. July 12, 1996). These courts agree with the Second Circuit's holding in *Ayeni* that officers violate the Fourth Amendment when they bring into the home third parties who are "neither authorized by the warrant to be there nor serving any legitimate law enforcement purpose by being there," in order "to magnify needlessly the impairment of their right of privacy." 35 F.3d at 686. As discussed in Part ID, *supra*, however, it is far from clear that the presence of news media cannot reasonably be judged to serve a "legitimate law enforcement purpose." Indeed, the court below was emphatic on this point, stressing the importance of understanding "the distinction between an intent that the reporters assist in the actual execution of the warrant and a reasonable belief that permitting the reporters to accompany the officers served a legitimate law enforcement purpose." Pet. App. 16a. Moreover, the court's conclusion in *Ayeni* that photographing or videotaping events which are in the officers' plain view amounts to a seizure under the Fourth Amendment, *see* 35 F.3d at 688, is almost certainly incorrect, as explained more fully in Part IB, *supra*.

In addition, the *Ayeni* holding has been roundly criticized for having departed from this Court's treatment of qualified immunity claims by failing "to define narrowly the right allegedly violated, instead describing the violation in abstract and general terms." *Bills*, 52 F.3d at 602. The *Ayeni* court had found that the law was "clearly established" because it has "long been established that the objectives of the Fourth Amendment are to preserve the right of privacy to the maximum extent consistent with reasonable exercise of law enforcement duties." 35 F.3d at 686. The *Bills* court cogently commented that it is "hard to imagine any contested search that could not be portrayed as an invasion of privacy, and even more difficult to see how a police officer could tailor his conduct under such a vague standard." 52 F.3d at 602. As with petitioners' rather abstract discussion of colonial common-law cases, such generalization of the Fourth Amendment would reduce the doctrine of qualified immunity to "a mere rule of pleading." *Id.*; *see also Anderson*, 483 U.S. at 639 (same).

This criticism is consistent with the Court's precedents governing the application of qualified immunity. In *Anderson*, the Court noted that operation of the qualified immunity standard greatly depends upon the level of generality at which the relevant "legal rule" is identified. 483 U.S. at 639. The Court cautioned that a plaintiff who alleges a constitutional tort cannot circumvent the plainly established rule of qualified immunity simply by alleging violations of extremely abstract rights. For example, "the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates the Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right." *Id.* To define the contested rights at an abstract level of generality would thus eviscerate the important protections that the Court affords through the doctrine of qualified immunity. *Id.*

In this situation, the doctrine of qualified immunity is designed to allow public officials to carry out their duties with "the decisiveness and the judgment required by the public good." *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974). Only by



faithful application of these settled principles can law enforcement officers "reasonably anticipate when their conduct may give rise to liability for damages" and tailor their behavior accordingly. *Scherer*, 468 U.S. at 195. Once again, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341. In the circumstances at issue here, respondents cannot plausibly be placed in either category.[15]

Only by upholding qualified immunity in this case would the Court remain faithful to its consistent warning that public officials are not required and "cannot be expected to predict the future course of constitutional law." *Procunier*, 434 U.S. at 562. That would be precisely the effect if the Court were to reject respondents' qualified immunity defense here. Particularly where — as here and as in *Mitchell* — there is no preexisting authority that clearly establishes the law one way or the other, and other lower court decisions had uniformly held that such conduct was lawful, this landscape should be the decisive factor which requires the defense of qualified immunity to be upheld.

### E. Petitioners Offer No "Clearly Established" Law Existing at the Time to Defeat the Defense of Qualified Immunity Here.

Petitioners recognize that the case law extant at the time had uniformly upheld the legality of respondents' conduct, though they disparage these precedents on grounds that they are mostly unpublished and were issued from "remote" jurisdictions. Pet. Br. 42-44. And they tacitly concede that the Court has never addressed even the general issue of when third parties may accompany officers who are executing a warrant, let alone the more specific issues presented when the accompaniment is by members of the news media. Indeed, petitioners acknowledge

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[15] As the Court has said about the "fair notice" requirement in the criminal law, the situation here is one where "disparate decisions in various Circuits might leave the law insufficiently certain" to be "clearly established." *United States v. Lanier*, 117 S. Ct. 1219, 1226-27 (1997).

that only one federal appellate decision had addressed even the general issue prior to April of 1992 — the Sixth Circuit's first interlocutory ruling in *Bills*, which was issued about a month before the events occurred in this case. *See* Pet. Br. 39-40 (discussing *Bills v. Aseltine*, 958 F.2d 697 (6th Cir. 1992)). That decision, however, was readily distinguished by the court below on the same grounds as the *Buonocore* case, because the officers in *Bills* had permitted the third parties to undertake "an independent search for items not described in the warrant," which did not occur here. *See* Pet. App. 11a n.6 & 12a n.9 (discussing and distinguishing *Buonocore* and *Bills*).

Petitioners are thus left only with subsequent decisions, which cannot be relied on as supporting authority, *see Mitchell*, 472 U.S. at 535; *Harlow*, 457 U.S. at 818, and their handful of colonial common-law cases which, as discussed previously, are inapposite and also are made to operate on too general a level to control the issues presented in this case, *see supra* Section IIA. In fact, there was no law whatsoever, and certainly no "clearly established" law, existing at the time respondents acted that had disapproved of such conduct or otherwise made its unlawfulness "apparent" to a reasonable officer. *Anderson*, 483 U.S. at 640.

Petitioners fault the court below for supposedly misapplying *Anderson*. Pet. Br. 34-36. According to petitioners, the court below incorrectly held that it must accept a defense of qualified immunity unless the Supreme Court or the Court of Appeals has previously issued "a decision establishing unconstitutionality in a factually indistinguishable case." *Id.* at 34. This is, to be sure, a legal standard that *Anderson* rejected, but it is not the legal standard that the court below applied in this case.

In *Anderson*, the Court explained that the application of qualified immunity to various situations, such as the kinds of fact-specific situations that arise under the Fourth Amendment, may raise first a legal question about *law*, and second a legal question about *facts*. With respect to the first issue, the Court emphasized that the inquiry into whether the law is "clearly established" must not occur at too great a "level of generality,"



for to hold that any action that violates a constitutional right *ipso facto* violates a right that is clearly established by the Constitution would reduce the qualified immunity doctrine to "a rule of pleading." 483 U.S. at 639-40. *See also supra* Section IIID (discussing media accompaniment cases in terms of this prong of *Anderson*). But the Court went on to point out that even where a general legal rule is identified, and is determined to be "clearly established," there is still a separate issue about whether it was clearly established that the circumstances confronted in a given case fall within the ambit of that general rule. *Id.* at 640-41. The Court's discussion of this secondary but nonetheless important issue merits quotation at length:

> Anderson contends that the Court of Appeals misapplied these principles. We agree. The Court of Appeals' brief discussion of qualified immunity consisted of little more than an assertion that the general right Anderson was alleged to have violated — the right to be free from warrantless searches of one's home unless the searching officers have probable cause and there are exigent circumstances — was clearly established. The Court of Appeals specifically refused to consider the argument that it was *not* clearly established that the circumstances with which Anderson was confronted did not constitute probable cause and exigent circumstances. The previous discussion should make clear that this refusal was erroneous. It simply does not follow immediately from the conclusion that it was firmly established that warrantless searches not supported by probable cause and exigent circumstances violate the Fourth Amendment that Anderson's search was objectively legally unreasonable.

*Id.* (emphasis in original).

This two-part inquiry is reflected precisely in the Court of Appeals' opinion in this case. First, the court below determined that there was "no clearly established law" indicating that respondents had "exceeded the scope of an arrest warrant by

permitting reporters to engage in activities in which they themselves could have engaged consistent with the warrant." Pet. App. 9a-10a. As we have seen, this determination is correct and, standing alone, is dispositive of the qualified immunity issue. Second, the court below determined that, in any event, it was not clearly established that the circumstances confronted by respondents even were encompassed by the rule postulated by petitioners:

> Furthermore, even if we were to agree with the Wilsons that in 1992 it was clearly established that the Fourth Amendment was violated if officers permitted third parties who were not expressly authorized by the warrant and who were not assisting reasonable law enforcement efforts related to the execution of the warrant to accompany them into a residence, we could not conclude that it was clearly established that the conduct in which these officers engaged manifestly fell within the ambit of that rule.

*Id.* at 10a. The court went on to present several reasons why reasonable law enforcement officers "could have believed that permitting the reporters to observe and photograph the execution of the arrest warrant advanced a legitimate law enforcement purpose related to the execution of the warrant." *Id.*

This approach is fully in accord with *Anderson*. Even if the existing case law had clearly established the constitutional rule sought by petitioners in this case — which it did not — the court must still determine "whether a reasonable officer could have believed" that the media could properly accompany him into the home in light of "the information the searching officers possessed." *Anderson*, 483 U.S. at 641. In this case, that secondary inquiry translated into the question of whether respondents could reasonably have believed that the media's presence "served a legitimate law enforcement purpose" in this and similar instances. Pet. App. 16a. The court below found that law enforcement officers acting in good faith "reasonably could have concluded that permitting the reporters to



accompany them while executing the warrant served a legitimate law enforcement purpose." *Id.* at 16a-17a. As discussed earlier, that conclusion is amply justified. *See supra* Section ID. It is, moreover, an accurate application of the Court's precedents on qualified immunity, and one that deserves to be upheld in this case. On each of the separate prongs of the qualified immunity doctrine as the Court articulated them in *Anderson*, respondents are entitled to prevail here.

## CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

RICHARD A. CORDRAY
*Counsel of Record*
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

*Counsel for Federal Respondents Harry Layne, James A. Olivo, and Joseph L. Perkins*

January 1999

# APPENDIX

A1

The Washington Post
Friday, May 1, 1992
Metro, Page D1

# For Fugitives, End of Freedom Dawns Suddenly; Early Morning Raids by Marshals Exploit the Element of Surprise

by Paul W. Valentine
Washington Post Staff Writer

"Police! Open the door! It's coming down!"

Kicked hard, twice, the wooden door shattered at the lock. Deputy U.S. Marshal Tony Oliva and Montgomery County Deputy Sheriff Mark Collins lunged, guns drawn, into the bedroom.

A man, naked except for a sheet across his midriff, blinked in apparent confusion from the bed in the dawn light.

"Put your hands where I can see them," barked Collins. ". . . Turn over, face down. FACE DOWN, mister!" Three officers swarmed over the man, cuffing his hands behind his back.

In seconds, it was over. The man, with a record of three convictions and 23 arrests on charges from drug possession to assault, was in custody for alleged violation of probation.

The lightning daybreak raid in Montgomery County was one of thousands nationwide in a special 10-week project just concluded by the U.S. Marshals Service and local police agencies to round up what they call "hardcore fugitives" — prison escapees, bail jumpers and parole and probation violators with records of violence, firearms offenses or drug charges. The "caution code" on their computerized criminal records often read "Armed."

The national dragnet, called Operation Gunsmoke, resulted in 3,313 arrests in 40 metropolitan areas and the seizure of $6.1 million in cash and property, including contraband such as guns and drugs, according to figures released by the U.S. Marshals

Service yesterday. Locally, officers arrested 350 fugitives and seized $37,169 in guns, drugs, and other property.

U.S. marshals are deputized to enforce state warrants as well as federal ones.

Fugitive arrests are a tense, adrenaline-pumping cat-and-mouse game with flak-jacketed officers facing unknown risks as they approach each door — or "fatal funnel" — behind which a fugitive is thought to be lurking.

Is the fugitive armed? Is anyone else there? A child? A dog? Perhaps nothing?

"You never know what's going to happen," said Collins, 28, who along with a fellow deputy sheriff, Eric Runion, was designated as a special deputy U.S. marshal for Operation Gunsmoke, with authority to cross state lines to make arrests. "Each day is different. Each warrant is different," Collins said.

To minimize the potential for violence, officers say they prefer to arrive at dawn. That's when they think fugitives least expect them. Officers burst into a room, three or four strong, guns drawn, shouting orders. The suspect usually acts disoriented, unable to escape or reach for a weapon.

"We like to get them in bed," said Collins. Or, as Oliva, 30, put it, "when they're most vulnerable."

At dawn, "I'm fresh and alert, and they're the least alert," said Joe Perkins, 30, another deputy marshal. Like Oliva, Perkins is a member of the marshals' Special Operations Group, trained in capturing fugitives. Perkins was flown in from Norfolk for Operation Gunsmoke, Oliva from Cleveland.

The officers wear rough clothes and running shoes for the occasional foot chase.

A quick show of force and a stern, no-nonsense manner show that "we're in charge and this is a one-way relationship," Perkins said. "It's got to be that way or someone will get hurt."

Before approaching a house or apartment, the marshals do their homework, checking computerized information for the



fugitive's most recent addresses, criminal history, drug addictions, scars, tattoos, weapons, relatives, intimates, telephone numbers.

The additional information is essential, said Deputy U.S. Marshal Harry Layne, supervisor for the Washington area Operation Gunsmoke, because with criminals "there are two rules: You carry no ID. And if you do, it's false ID."

Most important, several officers said, is making sure the fugitive is home when they arrive. Most criminals are habitual "floaters," who keep moving, Perkins said. The law requires that officers announce their presence and be virtually certain their quarry is inside before breaking down a door.

Getting the right address can be tricky. In addition to computer information, officers rely on relatives, informers and bail bond writers. "If we have a telephone number, sometimes we call a suspect and scam him" with a phony conversation to confirm his presence at an address, Oliva said.

With warrants and mug shots in hand, Oliva and Perkins fanned out into the District and Montgomery and Prince George's counties, along with other teams of marshals and local officers, nabbing suspects in their beds or at work sites or on the street.

The tools of their work included a sledgehammer, affectionately called the "master key," for knocking down fortified doors, as well as shotguns, tear gas and dogs.

Usually these were not needed, according to the marshals. Most suspects surrendered quietly.

At an apartment in the 19600 block of Crystal Rock Drive in Germantown last month, officers arrested Alvin Thomas, 34, wanted on two new drug charges in alleged violation of his probation for a 1987 drug conviction in Frederick County.

His record also showed a 1983 arrest on a charge of assault with intent to murder — a red flag to officers, although there was no record to indicate that he was convicted of the charge.

Thomas surrendered without incident.

With guns reholstered, the officers led him handcuffed to a waiting car. The tension subsided. Collins lit a cigarette for Thomas. The two chatted easily.

Oliva sniffed the early-morning breeze. "Spring's in the air," he said. "Crooks going to jail. You got to love this country."

PHOTOS by Margaret Thomas

*Photo Caption*: Deputy Marshal Tony Oliva gives Eric Runion a boost at a Gaithersburg house.

*Photo Caption*: At left, Deputy Sheriff Eric Runion guards Frederick McCann, who was apprehended in Silver Spring. At top, above, Deputy Marshal Tony Oliva, crouching, and Deputy Sheriff Mark Collins prepare to go through a door, while below, Oliva talks with Charles Bailey, arrested in Kensington, in a police car.

(7)



No. 98-83

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

CHARLES WILSON, GERALDINE WILSON, and RACHEL SNOWDEN, next friend/mother of VALENCIA SNOWDEN, a minor,

*Petitioners,*

v.

HARRY LAYNE, JAMES A. OLIVO, JOSEPH L. PERKINS, MARK A. COLLINS, ERIC E. RUNION, and BRIAN E. ROYNESTAD,

*Respondents.*

**On Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Fourth Circuit**

## BRIEF OF RESPONDENTS MARK A. COLLINS, ERIC E. RUNION, AND BRIAN E. ROYNESTAD

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

CARMEN M. SHEPARD
Deputy Attorney General

LAWRENCE P. FLETCHER-HILL
*Counsel of Record*
ANDREW H. BAIDA
JOHN B. HOWARD, JR.
Assistant Attorneys General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6345

Attorneys for Respondents
Mark A. Collins, Eric E. Runion,
and Brian E. Roynestad

51PP

## QUESTIONS PRESENTED

1. Does the Fourth Amendment permit law enforcement officers to allow a print reporter and still photographer to be present in a house where a valid arrest warrant is executed, when the media neither observed nor recorded anything that the law enforcement officials executing the warrant did not see and no photographs taken or information gathered at the house have ever been published?

2. Did the law enforcement officers act reasonably in light of established Fourth Amendment principles when, at the time, every court that had considered such conduct had upheld its constitutionality and no clearly settled law exists even today prohibiting the media's presence at the execution of an arrest warrant?

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No. 98-83

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

CHARLES WILSON, GERALDINE WILSON, and RACHEL SNOWDEN, next friend/mother of VALENCIA SNOWDEN, a minor,

*Petitioners,*

v.

HARRY LAYNE, JAMES A. OLIVO, JOSEPH L. PERKINS, MARK A. COLLINS, ERIC E. RUNION, and BRIAN E. ROYNESTAD,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

## BRIEF OF RESPONDENTS MARK A. COLLINS, ERIC E. RUNION AND BRIAN E. ROYNESTAD

## STATEMENT OF THE CASE

### A. Statement of Facts.

Mark A. Collins, Eric E. Runion, and Brian E. Roynestad are Deputy Sheriffs in the Montgomery County, Maryland Sheriff's Office. In April of 1992, they assisted agents of the United States Marshal's Service in "Operation Gunsmoke," a special apprehension program intended to take into custody dangerous fugitives wanted for drug and violent crimes. J.A. 15.

Dominic Jerome Wilson had been identified as a target of Operation Gunsmoke because of his outstanding charges for theft, robbery, and assault and his history of violations of probation. Deputy Sheriffs Collins and Runion assisted in the gathering of background information regarding Mr. Wilson and obtained criminal warrants for his arrest from the Montgomery County Circuit Court. J.A. 34-42. Deputy Sheriff Roynestad joined the team the morning of the execution of the warrant for Dominic Wilson.

The records for the Montgomery County Sheriff's Office showed Dominic Wilson's address as 909 North Stone Street in Rockville, Maryland. J.A. 48. Dominic Wilson had listed that address on numerous occasions as his address. *Id.* It was also the home of his parents, Charles and Geraldine Wilson. *Id.* In the early morning hours, the officers entered the home and were confronted by Charles and Geraldine Wilson, who had just gotten out of bed. J.A. 49. The officers directed Mr. Wilson to the floor, where he remained until the law enforcement officers determined that he was not Dominic and that Dominic was nowhere in the household, a total detention of approximately ten minutes. J.A. at 50. At that point, the law enforcement officers left.

A reporter and photographer from *The Washington Post* accompanied the Operation Gunsmoke officers during a two-week period in April 1992, including the day the officers attempted to execute the warrant for Dominic Wilson's arrest. Pet. App. 4a. The photographer took several photographs of the scene inside the Wilsons' house, but no photographs were ever published nor were the Wilsons ever identified in the newspaper. There is no allegation that the media conducted an independent search or undertook any activity other than being present where the officers were present and taking photographs that were



never disseminated.

Under the Memorandum of Understanding entered into between the United States Marshal's Service and the Montgomery County Sheriff's Office governing Operation Gunsmoke, the policy and management of the overall operation was the joint responsibility of a steering committee composed of representatives, deputies and agents of the United States Marshal's Service, other federal agencies and those participating from local law enforcement units. J.A. 16. While each entity retained responsibility for the individual conduct of its designated personnel, the steering committee assigned personnel to supervise the operations undertaken under Operation Gunsmoke. J.A. 17. The site supervisor for the Washington, D.C. operation of Operation Gunsmoke was Harry Layne, a supervisory Deputy United States Marshal in the United States Marshal's Office for the Superior Court of the District of Columbia. J.A. 47.

Deputy United States Marshal Layne made the decision to assign the press to ride along on Operation Gunsmoke. Fourth Circuit J.A. 129. He made that decision pursuant to a United States Department of Justice, United States Marshal's Service policy governing media ride-alongs. J.A. 4. As the guide recognized, media ride-alongs are an effective method to promote an accurate picture of law enforcement officials at work. *Id.*

The Deputy Marshals who participated in Operation Gunsmoke were instructed that a waiver of liability had been signed by the press, that the press representatives should be encouraged to wear vests, and that the activities of the press were not restricted as long as they did not impede the operation. Fourth Circuit J.A. 129. According to Deputy United States Marshal Perkins, the Deputy

Marshals' understanding was that the press was to ride along and "pretty much sit back and stay out of our way." Fourth Circuit J.A. 130. There was no specific discussion of whether the media would or would not be allowed to go into a private residence. Fourth Circuit J.A. 131. The press was neither invited onto the property nor told to stay off the property. Fourth Circuit J.A. 132.

In contrast to the written policy of the Marshal's Service, the Montgomery County Sheriff's Office had no established procedures applicable to media ride-alongs. Fourth Circuit J.A. 147. While Montgomery County Sheriff Raymond Kight stated in a deposition in 1994 that he would not ordinarily involve private citizens in the execution of a warrant because of the inherent danger that exists in such tours of duty (Fourth Circuit J.A. 147, 149), the training that office provided its deputies allowed room for discretion, in recognition of the fact that certain situations would permit law enforcement officials to bring a civilian to the scene of an arrest. Fourth Circuit J.A. 150. Accordingly, their policies as of 1992 did not prohibit a Deputy Sheriff from bringing a civilian into a private home. *Id.* Nothing in the Deputy Sheriffs' training or policies directly instructed them that the presence of the media would be improper.

**B. Proceedings Below.**

The Wilsons filed suit in the United States District Court for the District of Maryland, claiming that the officers violated the Fourth Amendment in three ways: (1) the officers used excessive force in attempting to execute the arrest warrant; (2) the officers lacked probable cause to believe that the fugitive would be found at the Wilsons' home; and (3) the officers permitted representatives of the media to enter the Wilsons' home to observe and



photograph the execution of the arrest warrant. The district court dismissed the allegations of excessive force and lack of probable cause, concluding that the evidence viewed in the light most favorable to the Wilsons demonstrated that the amount of force the officers employed was reasonable and that the officers possessed probable cause to believe that the fugitive they sought resided at and would be found in the Wilsons' home. J.A. 52-56.

The district court rejected the officers' assertions that allowing the reporters to enter the Wilsons' home without their consent did not violate their constitutional rights. Stating that "there is a core constitutional right . . . to be free from unreasonable searches and seizures," J.A. 64, the court held that the officers were not entitled to qualified immunity because, in April 1992, the law was clearly established that it was unconstitutional to permit members of the media to accompany law enforcement officers into a private residence during the execution of an arrest warrant. J.A. 64-67.

The officers appealed the denial of qualified immunity to the United States Court of Appeals for the Fourth Circuit, which reversed. The court of appeals initially held in a 2-1 panel decision that the officers were entitled to qualified immunity because the law did not clearly establish, at the time the arrest warrant was executed, that the Constitution prohibited law enforcement officials from allowing the media to accompany them into a home to observe and photograph the execution of the warrant. Pet. App. 51a. After the court of appeals subsequently voted to rehear the appeal en banc, a majority of the court upheld the officers' qualified immunity defense on the same ground, finding that "the legal landscape when these events occurred" was not "sufficiently developed that it would have been obvious to reasonable officers that the actions at issue were violative

of the Fourth Amendment." Pet. App. 17a. The court did not resolve the underlying question whether the Fourth Amendment is violated by the media's presence in a home during the lawful execution of an arrest warrant. *Id.*

## SUMMARY OF ARGUMENT

The governmental action complained of in this case did not result in a violation of the Wilsons' Fourth Amendment rights. While the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed," *United States v. United States District Court*, 407 U.S. 297, 313 (1972), respondents had the constitutional authority to enter the Wilsons' home because, as the district court found, they had an arrest warrant and probable cause to believe that the subject of the warrant, Dominic Wilson, resided in and was actually at the Wilsons' home. J.A. 52-53. That arrest warrant also vested respondents with the authority to conduct a limited search of the Wilsons' home to effectuate Dominic's arrest. Respondents' execution of the arrest warrant thus did not unlawfully infringe any reasonable expectation of privacy that the Wilsons had, because the Wilsons had no right to prevent government officials from entering their home pursuant to a warrant for the purpose of searching for and arresting their son.

The presence of the media during the execution of the arrest warrant did not violate the Fourth Amendment because it resulted in no additional infringement of the Wilsons' privacy expectations. As the court of appeals held, respondents did not exceed the scope of the warrant in allowing two reporters into the Wilsons' home because those reporters did not see or record anything that the officers executing the arrest warrant could not have also observed. Pet. App. 9a. Rather than assert that their privacy was infringed because it was a member of the media



who was in their house, the Wilsons base their Fourth Amendment claim on the physical intrusion that occurred when a warrant was executed for the purpose of arresting their son. The presence of law enforcement officials responsible for executing that warrant did not unconstitutionally violate any privacy rights, however, because those officials had the right to be in the Wilsons' house. Had the two additional individuals in the house been police officers rather than members of the media, that would not be enough to amount to a constitutional violation. The privacy analysis does not change merely because these individuals were not law enforcement personnel.

This is particularly so in a case such as this in which any incremental privacy invasion traceable to the media's presence is outweighed by the public interest that is served by allowing the media to be present during the execution of a warrant. While law enforcement officials may have a difference of opinion on the subject – and did in this case – a reasonable official could conclude that permitting the media to be present during the execution of an arrest or search warrant advances legitimate law enforcement goals. One of these goals is to keep the public adequately informed about the work of law enforcement officers, and is specifically embodied in the media ride-along policy that allowed the press to be present during the search of the Wilsons' house. Subsumed within that objective is the goal of ensuring that officers executing warrants will act within the boundaries of the law. Other valid goals served by allowing the media to witness the execution of a warrant include minimizing the risk that homeowners or other individuals who are present during the warrant's execution will become violent, and deterring others from engaging in criminal activity. It was thus appropriate for respondents to decide, in light of these legitimate law enforcement goals,

that the media could be present during the warrant's execution at the Wilsons' home.

Regardless of this Court's ruling on the merits of the Fourth Amendment issue, respondents are entitled to qualified immunity for their conduct in permitting the media to be present during the execution of the warrant. At the time the officers executed this warrant, there existed no clearly established law – indeed no law whatsover – to put the officers on notice that allowing the members of the press to observe and record the search might transgress the Fourth Amendment. Rather than cast doubt on the legality of permitting the press on the scene of the execution of a valid warrant, every court that had considered the issue before the events in question here occurred had upheld the constitutionality of that practice. Indeed, it was not until after the conduct at issue took place that the courts of appeals began to analyze the underlying constitutional issue at the level of specificity that now merits this Court's attention. And even with the benefit of hindsight, in 1999, an officer would still be at a loss to understand what constitutional standard applies in this situation, as the courts have yet to agree on the constitutional boundaries for media involvement in law enforcement operations.

Rather than rest their claim on any clearly established law, petitioners instead argue that broad Fourth Amendment principles of privacy of the home would have made it apparent to any reasonable law enforcement official that under no circumstances could members of the media observe the execution of a warrant in a home. Such an approach to liability, however, fails to provide officers the type of fair warning that the Constitution requires before monetary damages may be imposed on an individual officer. This Court's qualified immunity cases accordingly have flatly and repeatedly refused to hold officers liable for



violating the sweeping notions of privacy that petitioners rely upon.

Respondents also acted reasonably in light of existing law and the circumstances in which they found themselves. From the standpoint of the Montgomery County Deputy Sheriffs who were operating under the Marshal's Service guidelines, there was every reason to believe that the conduct they engaged in during the execution of the warrant here was objectively lawful. These officers could reasonably have determined, to the extent they could have discerned a constitutional concern related to the media's presence, that the very minimal, unobtrusive media presence in this case complied with the Fourth Amendment's balancing of privacy and law enforcement concerns, especially when the officers were executing a wholly valid warrant. They acted with objective legal reasonableness, therefore, in permitting the media to accompany them during the execution of the warrant at the Wilsons' home.

## ARGUMENT

### I. THE MERE PRESENCE OF THE MEDIA DURING THE EXECUTION OF A LAWFUL ARREST WARRANT DOES NOT VIOLATE THE FOURTH AMENDMENT.

This Court has held time and again that "the application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." *Smith v. Maryland*, 442 U.S. 735, 740 (1979). While respondents infringed the Wilsons' privacy expectations, that infringement was justified by the arrest warrant for their son, Dominic. The presence of the media during the execution of the arrest warrant did not violate the Fourth

Amendment because it did not result in any significant, additional invasion of privacy interests and those interests are outweighed by legitimate law enforcement objectives that the media's presence advances.

**A. The Arrest Warrant Gave Respondents Authority To Invade The Wilsons' Expectation Of Privacy.**

Although the "right of a man to retreat into his own home," *Silverman v. United States*, 365 U.S. 505, 511 (1961), is firmly embedded in our nation's jurisprudence and English common law, *see, e.g., Semayne's Case*, 5 Co.Rep. 91a, 91b, 77 Eng.Rep. 194, 195 (K.B. 1604), "common-law courts long have held that 'when the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K[ing]'s process, if otherwise he cannot enter.'" *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995) (quoting *Semayne's Case*). The privacy right within the home is thus not absolute.

Rather, "a man's home is, *for most purposes*, a place where he expects privacy. . . ." *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (emphasis added). More specifically, "[t]he right of the people to be secure in their . . . houses" exists only as to "unreasonable searches and seizures. . . ." U.S. Const. amend. IV. Thus, a search and seizure conducted inside a home without a warrant is not per se unreasonable but rather "presumptively unreasonable absent exigent circumstances." *United States v. Karo*, 468 U.S. 705, 715 (1984). Even in cases involving no warrant, therefore, this Court has recognized only that an "individual *normally* expects privacy free of governmental intrusion. . . ." *Id.* at 714 (emphasis added).

The presence of a valid warrant significantly changes the expectation "that society is prepared to recognize as



'reasonable.'" *Katz v. United States*, 389 U.S. at 361 (Harlan, J., concurring). Warrants "protect privacy interests by assuring citizens subject to a search or seizure that such intrusions are not the random or arbitrary acts of government agents" but rather are "authorized by law" and based on "the detached scrutiny of a neutral magistrate. . . ." *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 621-22 (1989). In requiring that an objective determination be made before a house may be searched or an individual arrested therein, "the warrant procedure minimizes the danger of needless intrusions of that sort." *Payton v. New York*, 445 U.S. 573, 586 (1980).

A properly executed warrant, therefore, enables law enforcement officials to lawfully "invade" the privacy rights of individuals. In *Payton v. New York*, this Court recognized that, "for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." 445 U.S. at 603. A warrant for a person's arrest thus may "impinge on both privacy and freedom of movement," *Dalia v. United States*, 441 U.S. 238, 258 (1979), because, in addition to authorizing the arrest of an individual, it "necessarily also authorizes a limited invasion of that person's privacy interest when it is necessary to arrest him in his home." *Steagald v. United States*, 451 U.S. 204, 214 n.7 (1981).

The privacy interests of others will also necessarily be infringed when, as in this case, they share or are found in the home where the police have probable cause to believe the suspect lives. *See Steagald*, 451 U.S. at 230-31 (Rehnquist, J., dissenting) ("If a suspect has been living in a particular dwelling for any significant period, say a few days, it can certainly be considered his 'home' for Fourth

Amendment purposes, even if the premises are owned by a third party and others are living there, and even if the suspect concurrently maintains a residence elsewhere as well."). Even a search warrant for contraband "implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Michigan v. Summers*, 452 U.S. 692, 705 (1981) (footnote omitted). A warrant for the arrest of a person whose home is occupied by others sanctions the same "substantial invasion of the privacy of the persons who reside[] there." *Id.* at 701. Those privacy interests must yield to the right of the police not only "to enter and to search anywhere in the house in which [the suspect] might be found," *Maryland v. Buie*, 494 U.S. 325, 333 (1990), but also, in appropriate circumstances after any arrest has been made, to conduct "a protective sweep, aimed at protecting the arresting officers. . . ." *Id.* at 335.

Respondents had the right to enter the Wilsons' home to search for Dominic because, as the district court found in this case, "there was a reasonable basis and probable cause . . . to believe that Dominic Wilson resided at the [Wilsons' home]." J.A. 52. The district court observed that Dominic had listed the Wilsons' address as his own in his probation records. *Id.* In addition, the Montgomery County Sheriff's Office "had the address" because "[h]e had used it on arrest records in the past." *Id.* Respondents also had taken into custody Dominic's brother, who on the morning the arrest warrant was executed "had been driven to the front of the premises and had indicated some time within 30 to 45 minutes prior to the entry that, in fact, Dominic Wilson lived at that address and, in fact, had been there the night before." J.A. 49. Based on this and the time when the arrest warrant was executed, the district court found "as a matter of law objectively that it was reasonable . . . that



early morning hour to believe that the suspect, Dominic Wilson, was at the address where [respondents] had reason to believe he dwelled." J.A. 53.[1]

Respondents' execution of the arrest warrant at the Wilsons' home, therefore, did not violate petitioners' Fourth Amendment rights. Respondents reasonably believed Dominic was in the Wilsons' house, and so it was "constitutionally reasonable to require him to open his doors to the officers of the law." *Payton v. New York*, 445 U.S. at 602-03. Even if petitioners "did harbor some subjective expectation" that the sanctity of their home "would remain private, this expectation is not 'one that society is prepared to recognize as 'reasonable.'" *Smith v. Maryland*, 442 U.S. at 743 (quoting *Katz v. United States*, 389 U.S. at 361). Respondents thus crossed the Wilsons' threshold with full constitutional authority and violated no expectations of privacy in entering their home and conducting a search for their son.

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[1] The existence of a valid warrant for Dominic Wilson's arrest, and the corresponding authority it contained for respondents to enter the Wilsons' home, contrasts this case with the English common law cases that petitioners rely upon. Those cases involved general warrants that did not give the defendants the authority either to enter or to conduct a search of the plaintiffs' homes. *See Wilkes v. Wood*, 98 Eng.Rep. 489 (1763); *Entick v. Carrington*, 95 Eng.Rep. 790 (1765); *Beardmore v. Carrington*, 2 Wils. K.B. 244 (1764). Respondents' execution of the arrest warrant did not violate any principle of law announced in these cases. On the contrary, the English common law recognized that "a warrant, properly penned, . . . will . . . at all times indemnify the officer, who executes the same ministerially." 4 William Blackstone, *Commentaries on the Laws of England* 288 (1772).

**B. The Media's Presence Did Not Cause Any Appreciable, Additional Intrusion On The Wilsons' Privacy Interests.**

While the Wilsons experienced an unwelcome intrusion on the privacy they expected in their home, that intrusion resulted from the lawful entry into the house, not from the presence of the media. Indeed, the media engaged in no conduct resulting in any additional incursion on their privacy. The presence of the media in the home did not violate the Wilsons' privacy rights, therefore, because the Wilsons' expectation of privacy was breached on the authority of a valid and constitutionally proper arrest warrant.

In rejecting the notion that "an individual has a legitimate expectation of privacy in the contents of a previously lawfully searched container," *Illinois v. Andreas*, 463 U.S. 765, 771 (1983), this Court held that not only is it "obvious that the privacy interest in the contents of [such] a container diminishes," *id.*, but that "[n]o protected privacy interest remains in a container once government officers lawfully have opened that container. . . ." *Id.* Thus, "once police are lawfully in a position to observe an item first-hand, its owner's privacy interest in that item is lost." *Id.* The rationale governing container searches and, more generally, plain view searches applies here.

The Wilsons' privacy rights could not be infringed "[o]nce frustration of the original expectation of privacy [had] occur[red]." *United States v. Jacobsen*, 466 U.S. 109, 117 (1984). As the court of appeals found, the media did not do anything that further frustrated those expectations. The court observed that respondents "did not exceed the scope of the warrant by permitting the reporters . . . into the Wilsons' home" because they did not allow the reporters "to



engage in activities that the officers could not themselves have undertaken consistent with the warrant." Pet. App. 9a. While the Wilsons suggest otherwise, the court of appeals found that "the reporters did not conduct a search of, or intrude into, any areas of the Wilsons' home into which the officers would not have been permitted to go in executing the arrest warrant." Pet. App. 9a. Thus, while petitioners complain that "Mr. Wilson was wearing underpants and Mrs. Wilson was wearing a sheer nightgown throughout the encounter," Br. at 5, the media's observation of this did not result in any incursion on their privacy that differed in any material respect from the invasion that accompanied respondents' entry into the house. On the contrary, respondents and the media saw exactly the same scene.

"The concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however well justified, that certain facts will not come to the attention of the authorities." *United States v. Jacobsen*, 466 U.S. at 122. The Wilsons' constitutional claim conflates these two distinct concepts. While the Wilsons' sense of violation is understandable, respondents' views and observations did not violate the Wilsons' privacy rights because "[t]he Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes" or "preclude an officer's observations from a . . . vantage point where he has a right to be and which renders the activities clearly visible." *California v. Ciraolo*, 476 U.S. 207, 213 (1986). *See also Florida v. Riley*, 488 U.S. 445, 450-52 (1989). Indeed, from the officers' perspective from the inside of the Wilsons' house, where respondents clearly had the right to be, "[i]f an article is already in plain view, neither its observation nor its seizure would involve any invasion of privacy." *Horton v. California*, 496 U.S.

128, 133 (1990). A third party's observation of the same article – or people in this case – does not lead to a different result.

This Court addressed the converse of the situation presented here in *United States v. Jacobsen*, in which federal drug enforcement agents inspected a package containing cocaine after the package had been opened by employees of a private delivery company. Stating that "[t]he Fourth Amendment is implicated only if . . . the expectation of privacy has not already been frustrated," 466 U.S. at 117, this Court found that the government's removal and inspection of the package's contents enabled the agents "to learn nothing that had not previously been learned during the private search." *Id.* at 120. The subsequent activity thus "infringed no legitimate expectation of privacy and hence was not a 'search' within the meaning of the Fourth Amendment." *Id. See also Illinois v. Andreas*, 463 U.S. at 771 ("If the inspection by police does not intrude upon a legitimate expectation of privacy, there is no 'search' subject to the Warrant Clause."); *United States v. Knotts*, 460 U.S. 276, 285 (1983) (holding "there was neither a 'search' nor a 'seizure' within the contemplation of the Fourth Amendment" when the acts complained of did not "invade any legitimate expectation of privacy").

That same principle applies in this case. Just as the package owner's privacy interests in *Jacobsen* were frustrated once the delivery company legitimately opened his package, the Wilsons' sense of privacy was lost when respondents lawfully required them to open their door and allow entry into the house based on the arrest warrant. To be sure, the Wilsons likely had stronger privacy expectations in their home than those of the owner of a package in the hands of a third party. But this difference does not alter the principle that a privacy interest, once



extinguished by a legitimate intrusion, will not be resurrected to form the basis for a new and different Fourth Amendment violation.

While neither the Wilsons nor the package owner consented to a stranger's invasion of their privacy, in both cases the conduct that initially caused the privacy invasion was entirely lawful. Given this, the "visual inspection," *Jacobsen*, 466 U.S. at 120, by a different party of the same thing or place in which that privacy interest has already been frustrated does not run afoul of the Fourth Amendment, whether that inspection is performed by government officials, as in *Jacobsen*, or by private individuals, as in this case. *See also People v. Boyd*, 474 N.Y.S.2d 661, 665 (N.Y.Sup. 1984) (stating that "having a knowledgeable person present at the execution of the search warrant . . . for immediate confirmatory viewing of seized property . . . constituted no greater intrusion on defendants' privacy than that which had already been authorized by the issuance of the warrant").

The fact that those individuals were members of the media does not alter this result. It certainly makes no difference that the media representatives were not police officers, as a number of courts have held that it is proper for law enforcement officials to use private parties in the execution of a warrant for a variety of purposes. *See, e.g., People v. Boyd*, 474 N.Y.S.2d at 666 ("[T]he courts of the five sister states that have had occasion to consider the issue of civilian assistance in search warrant situations have all ruled that the police need not forego the type of aid provided by Dillabough.") (citing cases); *State v. Ricci*, 472 A.2d 291, 298 (R.I.1984) (approving the right of the police to use a private citizen to identify stolen jewelry); *State v. Klosterman*, 317 N.W.2d 796, 803 (N.D.1982) (rejecting defendant's assertion that a deputy sheriff "violated his

constitutional rights by inviting and permitting non-law enforcement personnel to accompany him on the search"); *State v. Kern*, 914 P.2d 114, 117-18 (Wash.App.1996) (upholding search and retrieval of bank records by bank employees). Whether a person's privacy rights have been violated, therefore, does not turn merely on whether the individuals at the scene of a warrant's execution are private parties rather than police officers. *See also Commonwealth v. Farrar*, 413 A.2d 1094, 1098 (Pa.Sup.1979) ("Since Mrs. Campbell was present in order to help the trooper execute the warrant, her presence in the Farrar house was not an undue invasion of their privacy.").

The Wilsons suggest otherwise, claiming that the presence of the media in their house "intensifies the privacy invasion. . . ." Br. at 31. Petitioners' heightened sense of a privacy invasion, however, was not due to the fact that two representatives of the media were in their house. Indeed, the Wilsons were not even aware of this at the time the arrest warrant was executed. They acknowledged at their depositions that they had "no idea who it was taking pictures," J.A. 45; that they "didn't know that they were members of the press," J.A. 44; and that they did not learn that the reporter and photographer were with the Washington Post until "much, much later." J.A. 43. Rather, as Mrs. Wilson testified, she found it "embarrassing" and "humiliating" to have "all these men in my house." *Id.* It was thus the lawful execution of the warrant that violated Mrs. Wilson's sense of privacy, not the presence of two unidentified members of the media.

The act of taking photographs during the execution of the warrant also did not violate the Wilsons' constitutional rights. As the court of appeals noted, none of the photographs taken at the Wilsons' home has ever been



published.[2] Pet. App. 5a n.4. No Fourth Amendment violation results from the mere act of memorializing on film scenes that are in plain view of law enforcement officials who have an undisputed right to be in a person's home for the purpose of executing an arrest warrant. Such an act by itself results in no invasion of privacy and thus is no more of a "search" than was the government's inspection of the previously-opened package in *United States v. Jacobsen*. Indeed, the facts that the photographs were never published and that they depicted nothing more than what the officers saw puts this case in stark contrast with *Walter v. United States*, 447 U.S. 649 (1980). In that case, boxes containing obscene films were inadvertently delivered to a private party whose employees opened the boxes but did not view the films. Stating that "[t]he private search merely frustrated" the film owner's expectation of privacy "in part," *id.* at 658, a majority of this Court found that "[t]he projection of the films was a significant expansion of the search that had been conducted previously by a private party and therefore must be characterized as a separate search." *Id.* at 657 (opinion of Stevens, J.).

No such expansion occurred in this case. Taking but not publishing photographs of people and objects "that came into view during the . . . search would not have constituted

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[2] The outcome of this case does not turn on this fact. Officers who are accompanied by members of the press must expect that some account of their activities may be published. Indeed, such reporting serves legitimate law enforcement objectives, as discussed in the next section. Such reporting, however, need not infringe unnecessarily on privacy interests. The media have multiple editorial means of informing the public of events without publishing either the identities of individuals or compromising photographs of them.

an independent search, because it would have produced no additional invasion of [the homeowner's] privacy interest." *Arizona v. Hicks*, 480 U.S. 321, 325 (1987). Stated differently, while the Wilsons' privacy interests had already been invaded by the presence of the police, the photographs did not result, as petitioners suggest, in any "broadcasting to the general public what [the media] observed there." Br. at 19. In short, if the physical "seizure of an object in plain view does not involve an intrusion on privacy," *Horton v. California*, 496 U.S. at 141, then the unintrusive act of simply photographing it cannot create a constitutional violation.

It is thus irrelevant, as petitioners argue, that the warrants made "[n]o mention of media personnel" or the act of taking photographs. Br. at 3; *see also id.* at 19, 25, 31. Even when conduct exceeds the scope of a permissible search and is arguably "unrelated to the justification" for entering a home, "the 'plain view' doctrine can legitimate action beyond that scope." *Arizona v. Hicks*, 480 U.S. at 326. Taking photographs at the Wilsons' house did not constitute a "search" under the Fourth Amendment because the photos were only of scenes that respondents saw and thus did not cause any "additional invasions of [petitioners'] privacy. . . ." *United States v. Jacobsen*, 466 U.S. at 115.

The act of taking photographs also did not constitute a "seizure." "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. at 113 (footnote omitted). As this Court recognized in *Arizona v. Hicks*, the mere recording of serial numbers on stereo equipment observed in plain view did not interfere with any "possessory interest in either the serial numbers or the equipment, and therefore did not amount to a seizure." 480 U.S. at 324. *See also Texas v. Brown*, 460



U.S. 730, 739 (1983) (plurality) ("[W]hen a police officer has observed an object in 'plain view,' the owner's remaining interests in the object are merely those of possession and ownership."). The act of taking pictures of the Wilsons in front of respondents similarly failed to deprive them of any possessory interests. *See also United States v. Espinoza*, 641 F.2d 153, 167 (4th Cir.) ("Agent Dauwalder did not exceed the scope of the warrant by making photographs of what he saw in plain view and to that extent 'seizing' those views themselves as evidence."), *cert. denied*, 454 U.S. 841 (1981).

**C. Legitimate Law Enforcement Goals Advanced By Allowing The Media Inside The Wilsons' Home Outweigh The Minimal Breach Of Privacy That The Media's Mere Presence Caused.**

At most, the burden on the Wilsons' privacy caused by the media's presence in their home was *de minimis* compared to the far more fundamental intrusion lawfully resulting from the police entry itself. That minimal breach of privacy did not produce a Fourth Amendment violation. "The general touchstone of reasonableness, which governs Fourth Amendment analysis, governs the method of execution of the warrant." *United States v. Ramirez*, 118 S.Ct. 992, 996 (1998) (citation omitted). The ultimate determination of whether a warrant's execution was reasonable is to be made on a case-by-case basis in a manner that "strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of . . . warrants and the individual privacy interests affected." *Richards v. Wisconsin*, 117 S.Ct. 1416, 1421-22 (1997). The propriety of the warrant's execution in this case thus requires a balancing of the law enforcement objectives that the media facilitated against any incremental privacy intrusion the media's presence may have caused.

The act of striking that balance necessarily means that "[t]he Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule . . . that ignores countervailing law enforcement interests." *Wilson v. Arkansas*, 514 U.S. at 934. Petitioners nevertheless seek to persuade this Court to announce a rigid rule that the media can never be present at the scene of a warrant's execution, arguing that, under the rationale of the decision below, respondents "could each just as well justify bringing anyone and everyone inside the home with police. . . ." Br. at 33. This argument suffers in two fundamental ways.

First, it should not lightly be assumed that law enforcement officers executing a warrant will simply extend such an invitation to "any passerby who is on the street as the police arrive." *Id.* This Court has recognized, of course, "the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant." *Dalia v. United States*, 441 U.S. at 257. But the exercise of that discretion is not limitless. It is subject to "the general Fourth Amendment protection 'against unreasonable searches and seizures,'" *id.*, and the courts stand ready to correct abuses by officers.

A police officer who allows a private citizen into a home where a warrant is being executed does so at considerable risk that such an individual will venture beyond the scope of the officer's search and engage in conduct that runs afoul of "the remaining unfrustrated portion" of the homeowner's expectation of privacy. *Walter v. United States*, 447 U.S. at 659. If that risk were to materialize, as the court of appeals below had occasion to consider in another case, the officer might be exposed to monetary liability because "the Fourth Amendment prohibits government agents from



allowing a search warrant to be used to facilitate a private individual's independent search of another's home for items unrelated to those specified in the warrant." *Buonocore v. Harris*, 65 F.3d 347, 356 (4th Cir.1995). *See also Bills v. Aseltine*, 958 F.2d 697, 704-05 (6th Cir.1992) ("The warrant in this case implicitly authorized the police officers to control and secure the premises during their search for a generator. It did not implicitly authorize them to invite a private security officer to tour plaintiff's home for the purpose of finding General Motors property, thereby discovering evidence that might be of some use in a prosecution unrelated to that involving the Kubota generator.").

In short, "civilians who act at the behest of the state are treated as police agents, subject to the same controls and restrictions of the Fourth Amendment as the police themselves." *People v. Boyd*, 474 N.Y.S.2d at 666. *See also State v. Klosterman*, 317 N.W.2d at 803 (stating that "the non-law enforcement personnel must, in effect, be governed by the same rules as law enforcement personnel in considering their conduct during the search"). Given this, the parade of horribles that the Wilsons envision is simply unrealistic, as no reasonable police officer will risk exposure to liability by cavalierly opening the doors of a private home to let in any member of the public at random.

Second, and more important, respondents do not argue that police officers can simply invite anyone into a home where a warrant is being executed. Just as "[e]xcessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful and the fruits of the search not subject to suppression," *United States v. Ramirez*, 118 S.Ct. at 996, it would seem to be equally "unreasonable" within the meaning of the Fourth Amendment to permit third parties to

be present during the execution of a valid warrant when they have utterly no connection to law enforcement goals. But individuals should be allowed to accompany the police when their presence advances legitimate law enforcement objectives. For example, courts have held that the Fourth Amendment does not prohibit private citizens from being with the police during the execution of a search warrant for the purpose of identifying stolen property. *See People v. Boyd*, 474 N.Y.S.2d at 666; *State v. Ricci*, 472 A.2d at 298; *State v. Klosterman*, 317 N.W.2d at 803; *Commonwealth v. Farrar*, 413 A.2d at 1098. A marginal increase in the lawful "intrusion" on privacy also would be justified in other situations, such as when supervisory officials attend a warrant execution to ensure compliance by subordinates with departmental policies and procedures.

Undoubtedly, some police officials share the view of the Montgomery County Sheriff, who testified in this case that private individuals ordinarily should not accompany law enforcement officers when executing an arrest or search warrant at a person's home. *See* Fourth Circuit J.A. 149. A reasonable police officer could also conclude, however, as the court of appeals in this case observed, that a "legitimate law enforcement purpose" is served by "permitting media representatives to observe and photographically record the execution of an arrest warrant. . . ." Pet. App. 10a. One such purpose, as set forth in the media ride-along policy that allowed *The Washington Post* reporters to be present in the Wilsons' home, is to keep the public informed about what its law enforcement officials do:



> The U.S. Marshals Service, like all federal agencies, ultimately serves the needs and interests of the American public when it accomplishes its designated duties. *Keeping the public adequately informed of what the Service does can be viewed as a duty in its own right, and we depend on the news media to accomplish that.*
>
> Media "ride-alongs" are one effective method to promote an accurate picture of Deputy Marshals at work.

J.A. 4 (emphasis added). *See also* Pet. App. 15a ("[T]he media ride-along policy pursuant to which the reporters accompanied the officers indicated that keeping the public informed of the activities of the Marshals Service was a duty of that agency and that media ride alongs advanced that interest.").

Law enforcement officials could also determine, as the court of appeals stated, "that facilitating accurate reporting that improves public oversight of law-enforcement activities is a legitimate law enforcement purpose because it deters crime, as well as improper conduct by law enforcement officers." Pet. App. 10a. The court of appeals also found that such conduct advances the goal of "affording protection to the officers by reducing the possibility that the target of a warrant will resist arrest in the face of recorded evidence of his actions." *Id.*

The decision below does not stand alone on these points. A number of other courts have similarly recognized the propriety of law enforcement officials in bringing members of the media to the site of an arrest or search warrant execution. *See Moncrief v. Hanton*, 10 Med. L. Rep. 1620, 1621-22 (N.D.Ohio 1984); *Prahl v. Brosamle*, 295 N.W.2d 768, 773-75 (Wis.App. 1980); *Higbee v. Times-Advocate*,

*Inc.*, 5 Med. L. Rep. 2372 (S.D.Cal. 1980). *See also United States v. Appelquist*, 145 F.3d 976, 979 (8th Cir.1998); *Stack v. Killian*, 96 F.3d 159, 162-63 (6th Cir.1996); *Magenis v. Fisher Broadcasting, Inc.*, 798 P.2d 1106, 1110-11 (Or.App. 1990). These cases confirm that the decision whether to bring the media along falls within the acceptable range of discretion that police officers may reasonably exercise when executing a warrant.

The Wilsons argue that "there was in fact no law enforcement purpose served by the presence of the media in this case," Br. at 30, citing the deposition testimony of respondent Deputy Sheriff Mark Collins, who answered "no" to the question whether he thought that the media were "assisting" respondents "as law enforcement officers in any way." J.A. 119. There are two flaws in this assertion. First, and most obvious, the question whether the media were "assisting" respondents is entirely different from the issue whether their presence in the Wilsons' home advanced legitimate law enforcement purposes. While the media properly did not assist respondents in the actual execution of the warrant – for example, by either asking Charles Wilson whether he was Dominic or searching the house for Dominic – their presence nevertheless directly advanced the legitimate goals that the court of appeals cited.

Second, it is irrelevant what the personal views and beliefs of Deputy Sheriff Collins or any other respondent were on the subject of whether the media were "assisting" them by being in the Wilsons' home. As this Court has stated, "[n]ot only have we never held, outside the context of inventory search or administrative inspection . . . , that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary." *Whren v. United States*, 517 U.S. 806, 812 (1996). Just as "a lawful postarrest search of



[a] person would not be rendered invalid by the fact that it was not motivated by the officer-safety concern that justifies such searches," *id.* at 813 (citing *United States v. Robinson*, 414 U.S. 218, 236 (1973), and *Gustafson v. Florida*, 414 U.S. 260, 266 (1973)), so, too, would the media's advancement of a proper law enforcement purpose, by accompanying officers to the scene of a valid arrest warrant execution, not be made any less legitimate merely because one of those officers thought that the media were not assisting him as a law enforcement official. Petitioners are wrong, therefore, that the presence of the media in their house failed to advance any legitimate law enforcement purpose.

While the Wilsons also complain that there was no express authority in the warrant concerning the right to bring along the media, Br. at 25 and n.13, that does not invalidate respondents' exercise of discretion to allow the media to enter the Wilsons' house. Rejecting the proposition that warrants "must include a specification of the precise manner in which they are to be executed," *Dalia v. United States*, 441 U.S. at 257, this Court has stated that "[i]t would extend the Warrant Clause to the extreme to require that, whenever it is reasonably likely that Fourth Amendment rights may be affected in more than one way, the court must set forth precisely the procedures to be followed by the executing officers." *Id.* at 258.

Indeed, as this Court recognized in a related context, the failure of a warrant to list items that are subsequently found in plain view during the warrant's execution does not invalidate the seizure of those items, even when their discovery is not inadvertent. *See Horton v. California*, 496 U.S. at 138 ("The fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is

confined in area and duration by the terms of a warrant or a valid exception to the warrant requirement."). On the contrary, this Court found that, in such circumstances, "the scope of the search was not enlarged in the slightest by the omission of any reference to [the items] in the warrant." *Id.* at 141. The scope of the search at issue in this case was also not expanded by the warrant's failure to "authorize[] the media's presence," Br. at 25 n.13, because, for the reasons set forth previously, respondents did not allow the media to see anything that respondents could not see. Respondents thus properly exercised their discretion and advanced legitimate law enforcement purposes in permitting the media to enter the Wilsons' home. The exercise of that discretion violated no Fourth Amendment rights.

## II. RESPONDENTS ARE ENTITLED TO QUALIFIED IMMUNITY BECAUSE THEY ACTED REASONABLY IN LIGHT OF THE COMPLETE ABSENCE, THEN AND NOW, OF CLEARLY ESTABLISHED LAW PROHIBITING THE MEDIA'S PRESENCE AT THE EXECUTION OF AN ARREST WARRANT.

### A. Qualified Immunity Must Be Judged Pragmatically, Considering Both The State Of The Law And The Circumstances Faced By The Officers.

The court of appeals' decision can also be affirmed for the additional reason that qualified immunity bars the Wilsons' Fourth Amendment claim. Qualified immunity shields public officials from actions for damages if "a reasonable officer could have believed [his conduct] to be lawful, in light of clearly established law and the information . . . officers possessed." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). *See also Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985) (officials are entitled to



qualified immunity unless the law "clearly proscribed the actions" they took). This protection benefits the public by affording public officials, including police officers, leeway to make reasonable mistakes. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). Officials are freed to act vigorously, without the fear that they will be subjected to personal liability even when they "reasonably, but mistakenly" believe their acts are lawful. *Anderson*, 483 U.S. at 641. Early resolution of qualified immunity defenses using an objective standard avoids the diversion of public resources into expensive and time-consuming litigation. *Harlow*, 457 U.S. at 814.

The qualified immunity inquiry begins with a jurisprudential analysis uniquely within the province of judges and lawyers – whether the law was clearly established when the incident occurred – but the resolution of the inquiry ultimately is pragmatic, not academic. "[T]he court should ask whether the agents acted reasonably under settled law, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact." *Hunter v. Bryant*, 502 U.S. 224, 228 (1991). This is particularly true in cases involving law enforcement officers and the Fourth Amendment. *See Graham v. Connor*, 490 U.S. 386, 396 (1989) ("The 'reasonableness' of [the officer's conduct] must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," and "proper application of [the reasonableness test] requires careful attention to the facts and circumstances of each particular case."). The predicament of the individual police officer is no less acute when the officer is required to make judgment calls about the scope of his or her authority to make arrests within the home of a suspected felon: "The policeman on his beat must now make subtle discriminations that perplex

even judges in their chambers." *Payton v. New York*, 445 U.S. 573, 618-19 (1980) (White, J., dissenting); *see also Steagald v. United States*, 451 U.S. 204, 231 (1981) (Rehnquist, J. dissenting).

It is from this "objective (albeit fact-specific)" application of the law to the particular circumstances, *Anderson*, 483 U.S. at 641, that qualified immunity gains its pragmatic force, giving officers "ample room for mistaken judgments" and shielding "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 343 (1986). On an academic analysis alone, respondents cannot be held personally liable when the specific issue – whether media representatives may be present at searches or seizures inside a dwelling – has sharply divided those appellate judges who have confronted it. But their protection from personal liability is manifest when the inquiry is extended to the pragmatic level. Deputy Sheriffs Collins, Runion, and Roynestad entered the Wilson home fully within the authority of the arrest warrant they held. They cannot reasonably be charged with personal liability for the mere presence of a reporter and photographer, whom they had not invited to be present and who never stepped beyond the bounds of what the officers were authorized to observe.

**B. Neither In 1992 Nor Today Is There "Clearly Established" Law That The Media's Presence When An Arrest Warrant Is Executed In A Home Violated The Fourth Amendment.**

A court considering whether a claim overcomes a defense of qualified immunity must first "identify the exact contours of the underlying right said to have been violated." *County of Sacramento v. Lewis*, 118 S.Ct. 1708, 1714 n.5 (1998). If the violation of that right simply does not support



a claim of constitutional deprivation, the court need not consider whether the right was "clearly established." *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). If the allegations do rise to the level of a constitutional violation, then the court must consider whether the right was so "clearly established" as to give the defendant "fair warning" that his conduct will subject him to personal liability. *United States v. Lanier*, 117 S. Ct. 1219, 1227 (1997).

The specific underlying right alleged to have been violated in this case is an asserted Fourth Amendment right of persons, whose homes have been entered pursuant to a valid warrant, not to be observed and photographed by members of the news media. At the time the officers entered the Wilsons' home to serve the arrest warrant, no reasonably astute lawyer, based on a thorough search of the case law, could have opined that such a right, with the "exact contours" it later assumed, was clearly established. *County of Sacramento*, 118 S.Ct. at 1714 n.5. Indeed, that issue remains unclear today, as this Court grapples with the arguments of the parties on the underlying Fourth Amendment issue.

In April 1992, at the time the conduct at issue here occurred, not a single circuit court of appeals in the country had considered the question whether law enforcement officers violate the Fourth Amendment when they permit members of the media to observe and record the execution of a search or arrest warrant. The few federal district and state courts that had confronted the question had either found the conduct permissible in all respects, *see Moncrief v. Hanton*, 10 Med. L. Rep. at 1621-22 (no privacy interest protected under the Fourth Amendment was violated when police allowed media to enter home and film arrest); *Higbee v. Times-Advocate*, 5 Med. L. Rep. at 2372-73 (no constitutional violation where press was present during the

execution of a search warrant in a home); *Prahl v. Brosamle*, 295 N.W.2d at 774 (Fourth Amendment not violated because "the filming and television broadcast of a reasonable search and seizure, without more, [do not] result in unreasonableness"), or had found no constitutional violation and at most a common law tort. *See Scott v. Florida*, 559 So.2d 269, 272 (Fla.App. 1990) (filming by television crew did not affect validity of warrant's execution but might be invasion of privacy); *New Jersey v. Harris*, 237 A.2d 887, 889 (N.J.Super.) (presence of newspaper reporter and photographer "may well be a breach of proprieties" but did not render warrant invalid), *cert. denied*, 241 A.2d 13 (N.J.1968).

It was only after 1992, when the conduct under scrutiny here occurred, that the circuit courts of the nation began to consider, and differ on, the existence of the specific right now asserted. Those courts have disagreed on the existence of the asserted Fourth Amendment right itself, and they have split even more sharply over whether any such right could have been considered to have been clearly established. *Compare Wilson* and *Parker v. Boyer*, 93 F.3d 445, 447 (8th Cir.1996) (granting qualified immunity because it was not clearly established that "the police offend general fourth-amendment principles when they allow members of the news media to enter someone's house during the execution of a search warrant"), *cert. denied*, 117 S.Ct. 1081 (1997) *with Berger v. Hanlon*, 129 F.3d 505 (9th Cir.1997) (denying qualified immunity on basis that CNN broadcast team "transformed" the execution of a warrant into an entertainment event; distinguishing *Wilson*), *cert. granted*, 119 S.Ct. 443 (1998); *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir.1994) (denying qualified immunity because "objectives of Fourth Amendment . . . to preserve the right of privacy to the maximum extent" clearly established the



unlawfulness of police allowing media presence), *cert. denied*, 514 U.S. 1062 (1995).

Some courts have taken the position that media involvement in the execution of a search or arrest warrant was self-evidently a Fourth Amendment violation, based not on any case law considering the "exact contours of the right" asserted, but rather by inference from the text of the Fourth Amendment, emanations from the text establishing a zone of privacy in the home, and analogous cases involving the presence of third parties at the execution of warrants. *See Ayeni*, 35 F.3d 680; *Berger*, 129 F.3d 505.

Other courts, however, have found it to be far from self-evident that these general principles established the clear illegality of police allowing media to be present at searches, and instead have determined, as the court of appeals did in this case, that "reasonable jurists can differ" as to whether allowing the presence of the media transgresses general constitutional principles. Pet. App. 14a. *See also Parker*, 93 F.3d at 447 ("Even if we believed that those two cases [*Ayeni* and *Buonocore v. Harris*, 65 F.3d 347 (4th Cir.1995)] were entitled to consideration, they would appear to us to indicate at most the beginning of a trend in the law. Nor do we think it self-evident that the police offend general fourth-amendment principles when they allow members of the news media to enter someone's house during the execution of a search warrant.").

The muddled state of the law on this issue is perhaps best illustrated by *Bills v. Aseltine*, 958 F.2d 697 (6th Cir. 1992), which was decided just one month before the conduct giving rise to this action, and is the only case petitioners cite to support their argument that the law on media presence was clearly established. As petitioners acknowledge, *Bills* was "the only federal Court of Appeals

decision in existence prior to April 1992 that addressed the propriety of an intrusion by a private party *not* acting in aid of the law enforcement purpose that entitled law enforcement officials themselves to conduct a search." Br. at 39-40 (emphasis in original). But in holding that it violated the Fourth Amendment for a police officer to invite a private security officer into a home to assist in a search, the *Bills* court did not establish any broad rule that would apply "with obvious clarity," *Lanier*, 117 S.Ct. at 1227, to all instances where private persons are present during a search. On the contrary, when *Bills* came before the Sixth Circuit again after remand and after the Second Circuit decided *Ayeni*, the court criticized *Ayeni* for defining the right at issue in overly general terms:

> It is hard to imagine any contested search that could not be portrayed as an invasion of privacy, and even more difficult to see how a police officer could tailor his conduct under such a vague standard. As with the example of the Due Process Clause cited in *Anderson*, 483 U.S. at 640, 107 S.Ct. at 3039, the fact that the Fourth Amendment embodies "well-established" principles will not defeat a claim of qualified immunity. Otherwise, the doctrine is rendered a mere rule of pleading.

*Bills v. Aseltine*, 52 F.3d 596, 602 (6th Cir.), *cert. denied*, 516 U.S. 865 (1995).

Contrary to petitioners' argument, the Sixth Circuit did *not* consider the law governing third-party involvement in searches to be clearly established, even in 1995: "The full parameters of the role of private citizens in executing search warrants has not been completely, or clearly, defined. *Clouston* [*United States v. Clouston*, 623 F.2d 485 (6th Cir.1980)] says they may assist, *Ayeni* says they may not



exploit their role for commercial gain, and *Bills I* says that the reasonableness of the officer's invitation in this particular case must go to a jury, as it did." *Id.* at 603. *See also Stack v. Killian*, 96 F.3d 159, 162 (6th Cir. 1996) (affirming summary judgment in favor of police who permitted television crew into private home after search, despite the fact that warrant authorized only videotaping and did not expressly permit television crew). In short, the very court that decided the *only* pre-April 1992 case cited by petitioners as establishing the law on media presence at searches did not itself believe that this issue had been settled, even by 1995.

As this Court has recognized, "it is unfair to expect officials to anticipate changes in the law with a prescience that escapes even the most able scholars, lawyers, and judges." *Anderson v. Creighton*, 483 U.S. at 649 n.2. It would be anomalous, to say the least, to hold law enforcement officers to a *higher* standard of constitutional clairvoyance than lawyers and to subject them to personal liability for failing to discern constitutional principles that only subsequently began to take shape and that remain unresolved today.

### C. Broadly Stated Values Found In The Fourth Amendment Or The Common Law Do Not Provide A Sufficient Basis For Holding Officers Liable For Violating Narrowly Defined Rights.

This Court has refused to hold officials liable for "close calls" in the Fourth Amendment context even though broad statements of Fourth Amendment principles arguably established – at least in hindsight – the clear illegality of the conduct. For example, in *United States v. United States District Court*, 407 U.S. 297 (1972), this Court held that broad principles of Fourth Amendment privacy of the home

overrode proffered national security justifications, and thus found that electronic surveillance for domestic security purposes violated the Fourth Amendment. *See, e.g., id.* at 313. Although a unanimous Court found the practice under consideration there to be unreasonable, the Court nevertheless subsequently held, in *Mitchell v. Forsyth,* that the Fourth Amendment's sweeping injunctions did not so "clearly establish" that rule that Attorney General Mitchell should be denied qualified immunity for having authorized the search. Indeed, in *Mitchell*, as here, the divergent rulings of lower courts, and the fact that this Court saw the need to grant certiorari on the merits, weighed in favor of finding that the Fourth Amendment's broad terms did not provide meaningful guidance concerning the legality of a particular law enforcement practice, even to the nation's highest ranking attorney. In language that resonates with this case, the Court observed: "Two Federal District Courts had accepted the Justice Department's position, and although the Sixth Circuit later firmly rejected the notion that the Fourth Amendment countenanced warrantless domestic security wiretapping, this Court found this issue sufficiently doubtful to warrant the exercise of its discretionary jurisdiction." 472 U.S. at 534.

Similarly, in *Anderson v. Creighton*, this Court left open the possibility that the officers could be entitled to qualified immunity, despite the clearly established Fourth Amendment prohibition of warrantless searches unless officers have probable cause and there are exigent circumstances. The dissent in *Anderson* would have denied qualified immunity in light of the general prohibition of warrantless searches, arguing that longstanding Fourth Amendment principles of privacy in the home are so well established that further particularization of the right was not needed to alert a reasonable officer to the unlawfulness of



the conduct. 483 U.S. at 667-68 (Stevens, J., dissenting). But in language that applies with equal force to the generalized Fourth Amendment principles that petitioners assert here, the *Anderson* majority cautioned against reliance on general constitutional standards in the "clearly established law" analysis: the "operation of the [clearly established] standard depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified. For example, the right to due process is quite clearly established by the Due Process clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right." *Id.* at 639.

This Court has thus refused to hold law enforcement officials liable for damages on the basis of broad Fourth Amendment values. In much the same way as the dissent in *Anderson*, however, petitioners have invoked sweeping principles concerning privacy of the home to argue that the scope of permissible third-party presence at the execution of warrants can be divined with obvious clarity from these precepts. Indeed, petitioners have relied on the very same principles and cases that this Court in *Anderson* implicitly found to be too general to provide meaningful guidance to law enforcement officials. *Compare Anderson*, 483 U.S. at 667-68 (Stevens, J., dissenting) (quoting from *Payton v. New York*, 445 U.S. 573, 598-90 (1980), and *Silverman v. United States*, 365 U.S. at 511) *with* Pet. Br. at 12-13 (quoting the same language from the same cases).

It would be unfair and inconsistent with both *Mitchell* and *Anderson* to hold the respondents in this case personally liable on the basis of a hindsight determination that broadly worded Fourth Amendment notions clearly marked the precise constitutional limits of Fourth

Amendment reasonableness. Such general Fourth Amendment principles did not provide respondents with fair notice that they might be straying into a constitutional minefield. Last Term, this Court clarified that the requirement of "clearly established law" as a predicate for holding public officials civilly liable is directly analogous to the requirement of "notice" or "fair warning" in the criminal law context. *See United States v. Lanier*, 117 S.Ct. at 1224 (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.)) (due process requires that accused had "fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear."). While "general statements of the law are not inherently incapable of giving fair and clear warning," *Lanier*, 117 S.Ct. at 1227, such statements, or broadly analogous case law, must apply with "obvious clarity to the specific conduct in question" in order to constitute "fair warning." *Id.*

Unlike cases where the underlying conduct is inherently blameworthy, *see, e.g., Lanier* (sexual assault of employees in chambers by state court judge), searches and seizures under the Fourth Amendment routinely involve notoriously difficult judgments about whether a particular invasion of "the privacy of the home" is legal or illegal. *See Anderson*, 483 U.S. at 644 ("We have frequently observed, and our many cases on point amply demonstrate, the difficulty determining whether particular searches or seizures comport with the Fourth Amendment."). While some constitutional violations may obviously lie without prior definition in the case law, *see, e.g., Lanier*, 117 S.Ct. at 1227 (quoting *K.H. Through Murphy v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990)) ("There has never been . . . a section 1983 case accusing welfare officials of selling foster children into



slavery; it does not follow that if such a case arose, the officials would be immune from damages liability. . . ."), this Court has developed an elaborate scheme of rules to enforce the Fourth Amendment. Police officers cannot fairly be held liable in damages for failing to anticipate a "new rule" under the Fourth Amendment. *See* Barbara E. Armacost, Qualified Immunity: Ignorance Excused, 51 Vand. L. Rev. 583, 627 (1998) (noting that the risk of holding officers liable for "new rules" in the Fourth Amendment context is particularly acute "despite the fault-like language of the constitutional text . . . because much of Fourth Amendment jurisprudence is couched in the form of prophylactic rules which involve most significantly the complex set of judicial holdings that define the contours of the warrant requirement.").

Nor can the common law background to the Fourth Amendment be viewed as the source of definitive guidance to officers on the beat. Even if those principles were clear, "this Court has not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage." *Payton*, 445 U.S. at 591 n.33. The historical context "sheds light on . . . what the Framers of the Amendment might have thought to be reasonable," *id.* at 591, but the rules applicable to an officer today "have evolved through the process of interpreting the Fourth Amendment in light of contemporary norms and conditions." *Id.* at 591 n.33.

Moreover, the historical context is anything but clear. This Court recognized in *Payton* that "the adage that a 'man's house is his castle' . . . was one of the most vital elements of English liberty," *id.* at 596-97, but the application of that aphorism, to even so basic a question as whether warrantless entries of dwellings were permitted on suspicion of a felony, proved fraught with uncertainty. "A

study of the common law on the question . . . reveals a surprising lack of judicial decisions and a deep divergence among scholars." *Id.* at 592. "The most cited evidence of the common-law rule consists of an equivocal dictum in [*Semayne's Case*,]" *id.*, and "[t]he common-law commentators disagreed sharply on the subject." *Id.* at 593. The only "obvious" point this Court could discern was "that the common-law rule on warrantless home searches was not as clear as the rule on arrests in public places." *Id.* at 596. Even so, the Court's decision provoked a strong dissent by three justices, who complained that the decision "virtually ignores these centuries of common-law development, and distorts the historical meaning of the Fourth Amendment." *Id.* at 604 (White, J., dissenting).

One year later, in *Steagald*, the Court revisited the topic in holding that an arrest warrant alone would not justify entry without consent into the house of a party other than the subject of the warrant. Again discussing the diversity of opinion in the common law, the Court concluded that "the common law thus sheds relatively little light on the narrow question before us." 451 U.S. at 220. Although the dissent disagreed with how the question was framed and answered, it agreed that part of the problem derived from trying to answer "narrow question[s]" with broad principles:

> The basic error in the Court's treatment of the common law is its reliance on the adage that 'a man's home is his castle.' Though there is undoubtedly early case support for this in the common law, it cannot be accepted as an uncritical statement of black letter law which answers all questions in this area.
>
> * * *



> [T]he greater misfortune [of today's ruling] is the increased uncertainty imposed on police officers in the field, committing magistrates, and trial judges, who must confront variations and permutations of this factual situation on a day-to-day basis.

*Id.* at 229, 231 (Rehnquist, J., dissenting).

Deputy Sheriffs Collins, Runion, and Roynestad were "officers in the field" confronting a permutation of the Fourth Amendment issues on which the case law provided virtually no guidance and certainly no definitive guidance. Absent that, these officers cannot be said to have had constitutionally adequate notice that their conduct might subject them to liability. They should not be held accountable in damages should this Court in this case announce, for the first time, the acceptable parameters of media presence in the execution of warrants.

**D. The Respondents' Conduct In Allowing Members Of The Media To Observe The Search Was Objectively Legally Reasonable.**

Although both the Fourth Amendment and qualified immunity involve assessments of objective reasonableness, the qualified immunity analysis adds a layer to the Fourth Amendment inquiry. Under the Fourth Amendment, the question is whether the conduct was objectively reasonable in the circumstances. *Graham v. Connor*, 490 U.S. at 396. The qualified immunity doctrine asks, in addition, "whether [the officer] could-reasonably have believed that the force used did not violate the Fourth Amendment." *Id.* at 399 n.12 (citing *Anderson v. Creighton*). Qualified immunity thus allows that, even if the police conduct in fact was unreasonable, the officer nevertheless will not suffer personal liability for damages if he or she reasonably could have believed the action was justified.

Even assuming that reasonable officers might perceive a constitutional concern about allowing private persons to be present at the execution of a warrant – and no such clearly defined constitutional parameters existed at the time respondents entered the Wilsons' house – respondents, and particularly the Montgomery County Deputy Sheriffs, acted reasonably, legally, and properly given the information available to them and the circumstances confronting them. As this Court observed in *Anderson*, the fact that a legal principle may be clearly established at a higher level of generality does not mean that the law's applicability is clear in "the circumstances with which [an officer is] confronted." *Anderson*, 483 U.S. at 641. The determination of whether a particular official action is "objectively legally reasonable . . . will often require examination of the information possessed by the searching officers." *Id.* While the officer's "subjective beliefs . . . are irrelevant," the "objective (albeit fact-specific) question whether a reasonable officer could have believed [his conduct] to be lawful" takes account of the specific circumstances surrounding the official action. *Id.*

Particularly from the perspective of respondents Collins, Runion, and Roynestad, the Montgomery County Deputy Sheriffs, the circumstances of the media's presence gave them no reason to suspect that they might be crossing a clearly defined boundary of constitutional law. There is no evidence whatsoever that the Montgomery County officers had any role in inviting the media along for the search, much less into the house. The information possessed by the county officials, based on the uncontroverted facts, was that the deputy sheriffs were operating under the Marshal's Service guidelines, including the media ride-along policy. The Deputy Sheriffs did not participate in the decision to bring along the members of the press, nor did they have any



control, or even knowledge, of whether the press would be entering the home.

Plainly, these officers could reasonably have believed that their duty was not to intervene actively to override the Marshal's Service decision to bring the media along, but instead to fulfill their assigned roles in executing the warrant. Sheriff Kight, despite testifying that he would not personally approve media entry into the home, did not consider his deputies to have violated the law by failing to intervene under the circumstances:

> If I--if I were a deputy at that time on the scene? I would envision that as a program that was entirely supervised by the U.S. marshal's service, and I figure they know what they're doing, and they've had to encounter this before, and they -- you know, if they didn't violate anybody's constitutional rights by beating them or battering or bruising them; of course I would stop something like that. But a mere trespass, I would figure they had knowledge of what they were doing and knew what they were doing.

Exh. H-5 to Plaintiffs' Opposition to Motion for Summary Judgment and Cross-Motion for Partial Summary Judgment at 27.

The respondents also reasonably could have believed that the existence of a valid warrant diminished the legitimate expectation of privacy such that the media's presence was permissible. While petitioners emphasize the "humiliating circumstances under which the Wilsons were detained and photographed," Br. at 38, the objective legality of the officers' actions in allowing the media into the house does not turn on the nature of the activity that was observed. As set forth earlier, the officers in this case were executing a valid warrant, and the media did nothing in connection

with the search beyond what the officers were authorized to do. *Cf. Ayeni*, 35 F.3d at 690 (search that was filmed by CBS crew was independently illegal because officers initially entered without warrant or exigent circumstances). Reasonable officials could conclude that the mere presence of the media in these circumstances does not result in any additional privacy invasion.

It also would have been "objectively legally reasonable" for respondents to have believed that the media presence was permissible, as long as it was limited, the intrusion minimal, and the operation itself not transformed into an entertainment event. Indeed, even the Ninth Circuit in *Berger* implied that the more limited media role in this case might be reasonable. Distinguishing rather than disagreeing with the Fourth Circuit's decision in this case and the Eighth Circuit's decision in *Parker*, the court observed that "[i]n none of these cases did law enforcement officials engage in conduct approaching the planning, cooperation and assistance to the media that occurred in this case." 129 F.3d at 512. Hence, even if *Berger* had been decided before April 1992, and could have then been deemed to set forth "clearly established law," it is far from evident that the respondents here would have been acting unreasonably, according to the standard announced in that case.

Finally, in view of the unsettled state of the law and the minimal nature of the intrusion in this case, the respondents could reasonably have believed that allowing the media to observe the search furthered legitimate law enforcement purposes. From an objective standpoint, it would be entirely reasonable for respondents to have believed that the media's presence would further the goal, expressly set forth in the Marshal's Service policy, of keeping the public informed of law enforcement activities. Moreover, it would not have been unreasonable to have believed that newspaper



articles describing vigorous law enforcement may serve to deter crime. The presence of media at specific operations such as this one can also document the conduct of officers and minimize the likelihood of a violent confrontation or resistance to arrest. While petitioners seek to sweep these purposes aside, five judges of the *en banc* Fourth Circuit in this case found that they constitute reasonable justifications for the presence of members of the media. Pet. App. 10a, 15a-16a.

Respondents did not violate, therefore, clearly established rights of which a reasonable official would have known. They acted under the full authority of a warrant in making the entry, and none of the circumstances of this case suggests that they reasonably should have anticipated that the limited presence of the media could amount to a constitutional wrong. Their qualified immunity claim should accordingly be sustained.

## CONCLUSION

For the reasons stated, the judgment of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

CARMEN M. SHEPARD
Deputy Attorney General

LAWRENCE P. FLETCHER-HILL
*Counsel of Record*
ANDREW H. BAIDA
JOHN B. HOWARD, JR.
Assistant Attorneys General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6345

Attorneys for Respondents
Mark A. Collins, Eric E. Runion,
and Brian E. Roynestad

FOR ARGUMENT

No. 98-83



In The

# Supreme Court of the United States

October Term, 1998

CHARLES WILSON, GERALDINE WILSON and RACHEL SNOWDEN, next friend/mother of VALENCIA SNOWDEN, a minor,

*Petitioners,*

vs.

HARRY LAYNE, JAMES A. OLIVO, JOSEPH L. PERKINS, MARK A. COLLINS, ERIC E. RUNION and BRIAN E. ROYNESTAD,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

## REPLY BRIEF FOR PETITIONERS

*Of Counsel:*

STEVEN R. SHAPIRO
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500

ARTHUR B. SPITZER
American Civil Liberties Union of the National Capital Area
1400 20th Street, N.W.
Washington, D.C. 20036
(202) 457-0800

DWIGHT H. SILLIVAN
American Civil Liberties Union of Maryland
2219 St. Paul Street
Baltimore, MD 21218
(410) 889-8555

RICHARD K. WILLARD
*Counsel of Record*
DAVID H. COBURN
JAMES S. FELT
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000

RICHARD SELIGMAN
601 Indiana Avenue
Suite 910
Washington, D.C. 20004
(202) 745-7800

*Attorneys for Petitioners*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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## ARGUMENT

### I. RESPONDENTS CAN MAKE NO REASONABLE ARGUMENT THAT THEIR CONDUCT COMPLIED WITH THE FOURTH AMENDMENT

Respondents advance two lines of argument in an effort to defend the constitutionality of their decision to bring the media into a private home without either the consent of the homeowners or the authorization of a neutral magistrate. The first argument is categorical – that the Fourth Amendment is not even implicated in this case because the media saw nothing more than the police were authorized to see in the course of executing the warrant. Their backup argument is that any additional intrusion caused by the media in this case was negligible and counterbalanced by a variety of benefits to the overall "mission" of law enforcement. Both arguments should be firmly rejected.

#### A. Fourth Amendment Protection Against Unreasonable Intrusions Into The Home Does Not Disappear Because of A Reasonable Intrusion

Respondents'. case is built on the assumption that Fourth Amendment protection of the home against unreasonable intrusions vanishes once a government official establishes a constitutional foothold inside. According to respondents, "the media's observation of [Mr. Wilson in his underpants and Mrs. Wilson in a sheer nightgown] did not result in any incursion on their privacy that differed in any material respect from the invasion that accompanied respondents' entry into the house. On the contrary, respondents and the media saw *exactly the same scene*." State Resp'ts Br. at 15 (emphasis added). Under respondents' constitutional regime, anyone and everyone – no matter for what purpose – can be invited into a

private home, just so long as they are restricted to seeing "exactly the same scene" a government official is entitled to see. Media observation of a strip search would be lawful under this "exactly the same scene" theory of Fourth Amendment protection since, as respondents argue, "a privacy interest, once extinguished by a legitimate intrusion, will not form the basis for a new and different Fourth Amendment violation." State Resp'ts Br. at 16-17.

Respondents' argument proves too much. By cobbling together the plain view doctrine and the "legitimate expectation of privacy" standard, they assume away all privacy interests of the occupants of a home so that one need not ask whether a subsequent intrusion was "reasonable," one need merely ask whether the subsequent intruder saw only what was seen during the course of the initial, reasonable intrusion. If the answer is yes, then the Fourth Amendment does not apply – the subsequent intruder could not have infringed a legitimate expectation of privacy. The logical consequence of respondents' argument is that no court could ever conclude that the intrusions of third parties "to observe and record" is unreasonable since there are no privacy interests left for them to intrude upon. This argument would create a *per se* rule that permits the police to bring the media to observe and record any authorized search or seizure without having to satisfy the Fourth Amendment's requirement of reasonableness. This cannot be a correct reading of the Constitution.

This Court, moreover, has recognized that the Fourth Amendment requires analysis of the purpose of a search, and that an intrusion for one purpose does not somehow destroy all reasonable expectations of privacy. Thus, the Court has repeatedly held the nature and scope of a



search must be reasonably related to the purposes of the search. *See, e.g., New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1984) ("Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive. . . . "). Here, respondents' decision to invite the media into petitioners' home significantly broadened the scope and intensified the intrusiveness of the search for reasons that were entirely unrelated to the purposes of the warrant. This Court also rejected respondents' all-or-nothing approach to Fourth Amendment protection when it held that the government's right to enter an employee's office for work-related reasons does not extinguish all privacy claims when it enters the employee's office for law enforcement reasons. Indeed, in *O'Connor v. Ortega*, 480 U.S. 709 (1987), decided five years prior to the events that gave rise to this lawsuit, every Member of the Court agreed that:

> Constitutional protection against unreasonable searches by the government does not disappear merely because the government has the right to make reasonable intrusions in its capacity as employer.

480 U.S. at 729 (Scalia, J., concurring in the judgment); *id.* at 717 (plurality opinion); *id.* at 738 (Blackmun, J., dissenting).

Respondents' belittling of the privacy invasion occasioned by bringing the media into people's homes – particularly, as here, when the occupants were expected to be in bed – is unjustifiable and disquieting. Given the media's power to disseminate information and images far and wide, without any governmental restraints, bringing them into a private home is particularly destructive of privacy, and runs counter to basic notions of what privacy ultimately entails – the ability to control when and

how and to what extent information about one's self is disclosed to others. *See, e.g.*, Adam Carlyle Breckenridge, *The Right to Privacy* 1 (1970) ("Privacy, in my view, is the rightful claim of the individual to determine the extent to which he wishes to share of himself with others. . . . It is also the individual's right to control dissemination of information about himself"); Alan F. Westin, *Privacy and Freedom* 7 (1967) ("Privacy is the claim of individuals . . . to determine for themselves when, how, and to what extent information about them is communicated to others"); *Webster's Third International Dictionary* 1804 (1981) (defining "privacy," in part, as "freedom from unauthorized oversight or observation").

The Framers were also concerned about the divulgement of information that searches entailed. From the time of *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763), to the time of the Fourth Amendment's adoption, "opinion on search and seizure had moved beyond [general] warrants to derivative and deeper issues. The underlying theme of [the *Wilkes Cases*] in the 1780's was that general warrants were wrong not just because they permitted general searches but because searches threatened privacy." William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* 1547-48 (1990).

Respondents attempt to justify the media intrusion in this case by arguing that members of the public were originally allowed to effectuate or assist in felony arrests, for example, as a *posse comitatus*. *See* Fed. Resp'ts Br. at 26-30. This argument is inapposite – respondents concede that the media in this case did nothing to assist in executing the warrant. *Id.* at 4, 6. At common law, "[t]he party taking upon him to execute process, whether by writ or warrant, *must be a legal officer for that purpose, or an assistant to such.*" 1 Edward Hyde East, *East's Pleas of the*



*Crown* 312 (1803) (emphasis added). The common law recognized no right for legal officers to bring third parties into a home under the authority of a warrant when their presence had nothing to do with the execution of that warrant. Respondents have pointed to no common law tradition to the contrary.

Moreover, the public character of a felony arrest provides no justification for invading the privacy of petitioners. Charles and Geraldine Wilson were not named in the warrant or suspected of any wrongdoing. Their son was not present when the police entered the home, and no arrest occurred. The fact that the names and photographs of the Wilsons were not published was due to the independent editorial judgment of the newspaper. Respondents did not do – and legally could not have done – anything to stop the newspaper from publishing embarrassing private information about the Wilsons if it had chosen to do so. The newspaper remains in possession of the photographs and can choose to publish them at any time. Under these circumstances, respondents' cavalier disregard for the Wilsons' privacy can find no support in historical practices regarding felony arrests.[1]

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[1] Respondents, in fact, would have been liable as trespassers at common law for entering the Wilson home and not finding Dominic there. *See* 2 Sir Matthew Hale, *The History of the Pleas of the Crown* 117 (1678) (Official attempting to execute warrant for felony arrest at house of another "must at his peril see that the felon be there, for if the felon be not there, he is a trespasser to the stranger, whose house it is"). Dominic Wilson did not live at his parents' house in Rockville, Maryland. He lived in Kensington, Maryland. Court of Appeals Joint Appendix ("C.A.J.A.") at 77, 94, 95. Contrary to respondents' description of the facts, Dominic's brother was never asked and never told respondents where Dominic lived, might be found, or that Dominic had been at his parents' house the night before.

In any event, "the fact that an event is not wholly 'private' does not mean that an individual has no interest in limiting disclosure or dissemination of the information." *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 770 (1989) (quotations omitted). In *Reporters Committee*, the Court held that the disclosure of the contents of an FBI rap sheet could reasonably be expected to invade personal privacy under the Freedom of Information Act and rejected as a "cramped notion of personal privacy" an argument similar to the one respondents present here – that since the contents of the rap sheet had been previously disclosed to the public, the privacy interest at stake "approache[d] zero." 489 U.S. at 762-63. The Court concluded that "[t]he privacy interest in maintaining the practical obscurity of rap-sheet information will always be high." *Id.* at 780.

### B. A Reasonable Officer Could Not Have Believed That the Fourth Amendment Authorized Bringing the News Media Into Petitioners' Home

The question here is not whether the Wilsons had a "legitimate expectation of privacy" vis-á-vis third parties seeing what respondents saw, but rather whether – given the fact that the Fourth Amendment applies to the Wilson home (and hence the Wilsons at all times had a legitimate expectation of privacy therein) – respondents' actions in facilitating the media's intrusion into the Wilson home for the purpose of gathering information and photographic images for publication in *The Washington Post* were reasonable. For an intrusion into a home to be

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C.A.J.A. 76-77. Moreover, this entire episode could have been avoided if the common law knock-and-announce requirements had been followed. *See* Hale at 116-17.



reasonable, it has to be authorized by a warrant (or one of the carefully delineated exceptions to the warrant requirement, none of which is at issue here). *See Payton v. New York*, 445 U.S. 573, 575 (1980) ("Fourth Amendment . . . prohibits warrantless and nonconsensual entry. . . . "). So, the constitutional question is whether the warrant authorized respondents to facilitate the media's intrusion into the Wilson home. The qualified immunity question is whether a reasonable officer could have believed that the warrant authorized respondents to facilitate the media's intrusion into the Wilson home.

Although respondents accuse us of contending otherwise, we agree that a warrant implicitly authorizes an officer to take reasonable steps that are not spelled out in the warrant but which are related to accomplishing the warrant's purpose, including bringing private citizens along to help.[2] *Dalia v. United States*, 441 U.S. 238 (1979), explains that the *manner* in which an authorized search is conducted is always subject to later judicial scrutiny as to its reasonableness. This assessment of reasonableness, however, is not cut free from the mooring that the warrant's purpose provides. It was well-settled prior to April 1992, for example, that "any destruction [of property] caused by law enforcement officers in the execution of a search or arrest warrant must be necessary to effectively execute that warrant." *Ginter v. Stallcup*, 869 F.2d 384, 388

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[2] Respondents are thus incorrect when they accuse us of seeking a "*per se* rule against third parties accompanying officers into a residence to execute a warrant," Fed. Resp'ts Br. at 21, and as contending that "officers executing an arrest warrant are constitutionally disabled, upon entering a residence, from taking actions that are not expressly authorized by the warrant and that would violate the common law." Fed. Resp'ts Br. at 30. We are not seeking or contending such things.

(8th Cir. 1988); *see Tarpley v. Greene*, 684 F.2d 1, 9 (D.C. Cir. 1982) ("destruction of property that is not reasonably necessary to effectively execute a search warrant may violate the Fourth Amendment"). In *Dalia*, the Court found that an electronic surveillance order particularly describing the premises to be bugged did not have to "make explicit what *unquestionably is implicit* in bugging authorizations: that a covert entry . . . may be necessary for the installation of the surveillance equipment." 441 U.S. at 258 (emphasis added).

Similarly, *Payton v. New York* found that an arrest warrant "implicitly carries with it the *limited authority* to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." 445 U.S. at 603 (emphasis added). And, in *Michigan v. Summers*, 452 U.S. 692 (1981), it was recognized that officers executing a search warrant for contraband had implicit, limited authority to detain occupants of the premises while the search was being conducted. The detention was justified by: (1) legitimate law enforcement purposes (safety of the officers and prevention of flight) and (2) articulable and individualized suspicion that the detained person harbored contraband. 452 U.S. at 705.[3]

These cases stand for the proposition that officers may take actions that are not spelled out in a warrant, but which are reasonable in accomplishing the warrant's purpose. But in this case, respondents have repeatedly and explicitly conceded that the media's presence had nothing whatsoever to do with accomplishing the arrest of

[3] Before finding that the limited detention was constitutional based on the foregoing factors, the Court was careful to note that it was "necessary to examine both the character of the official intrusion and its justification." 453 U.S. at 701-02.



Dominic Wilson. *See, e.g.*, State Resp'ts Br. at 26 ("the media properly did not assist respondents in the actual execution of the warrant"); Fed. Resp'ts Br. at 9 ("[t]he newspaper personnel did not actively participate in executing the arrest warrant"); *id.* at 20 ("they provided no immediate physical assistance to the officers in making an arrest"). Because of this critical concession, there is no occasion for the Court to perform a balancing test to determine whether it was reasonable for the private citizens to be brought into the Wilsons' home to assist in executing the warrant. That is not why they were there, and thus their presence was *ipso facto* unreasonable.

Even if we were to assume, for qualified immunity purposes, that the arrest warrant implicitly authorized respondents to do anything they wanted that was even arguably or rationally related to the much broader mission of bringing Dominic Wilson to justice and protecting themselves from harm and liability, their conduct would still not be authorized by the warrant. The media were not brought inside the Wilson home to serve purposes related to that mission nor did they serve those purposes. They were engaged in an entirely different search – a search for information and photographic images for the benefit of their employer, *The Washington Post* – a search that was not authorized by the warrant.

The only qualified immunity issue that remains is whether a reasonable officer, knowing what respondents knew,[4] could have believed that the media's intrusion was for a purpose related to accomplishing the objective

[4] *See Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (qualified immunity to be determined "in light of clearly established law and *the information the searching officers possessed*") (emphasis added).

of the warrant. Respondents provide an ever-growing number of *post hoc* rationalizations as to what law enforcement interests a reasonable officer might have believed were served by the media's presence. Not a single one of those interests was brought up before the district court. *See* Mem. in Support of Mot. for Summ. J. docketed Sept. 27, 1995. At the court of appeals, respondents asserted in their opening brief only that they were following a media ride-along policy whose purpose was "to promote accurate and beneficial reporting." Br. of Appellants at 18. In their reply brief they explained that media oversight leads to the deterrence of crime and police misconduct. *See* Reply Br. of Appellants at 6-7. In this court, for the first time, respondents speculate that a reasonable law enforcement officer might have believed that media presence (1) promoted officer safety and (2) fulfilled a need for an accurate record of events. The other interests respondents identify all fit under the vague, catch-all category of "law enforcement mission" (*i.e.*, (3) educating the public, (4) deterring crime and (5) deterring police misconduct).[5] These latter interests have nothing to do with the capture of Dominic Wilson and are therefore irrelevant.

---

[5] Respondents repeat "law enforcement mission" like a mantra of some constitutional significance, but provide no indication as to what it means or how it can be limited. There is hardly a thing that a third party could do that does not arguably advance some purpose related to a broader law enforcement mission. The only constitutionally sound approach is to judge third-party participation in the execution of warrants by whether it is designed to advance the specific purpose that justifies the intrusion in the first place, which is precisely what the "in aid of" language of 18 U.S.C. § 3105 requires. *See* Br. of *Amicus Curiae* NASCAT at 24-25, filed in *Hanlon v. Berger*, No. 97-1927.



On the other hand, officer safety and the need for an accurate record are, as a general matter, legitimate interests that justify officers taking steps that are not spelled out in a warrant. However, in this case, no reasonable officer knowing what respondents knew could have believed those interests were served by bringing the media into the Wilson home. The record is clear that respondents could not have been relying on the media either to promote respondents' safety or to provide an accurate record of their conduct for use in later legal proceedings. Indeed, respondents' argument is belied by their own description of their relationship with the media in this case:

> "We had no control over what he was writing or recording and what she was photographing." (Olivo Aff. at 6); C.A.J.A. at 83.
>
> * * *
>
> Q. Well, the press – on April 16, 1992, they were not assisting you as law enforcement officers in any way, were they?
>
> A. No.
>
> (Collins Depo. at 157); C.A.J.A. at 119.
>
> * * *
>
> Q. They were just along, and you just didn't pay much attention to them?
>
> A. Correct.
>
> (Collins Depo. at 157); C.A.J.A. at 119.
>
> * * *
>
> "[T]he understanding between ourselves and the press was that you need to stay out of the way while we do our job." (Perkins Depo. at 59); C.A.J.A. 132.

As a general matter, with respect to the interest in officer safety, the Model Rules of Law Enforcement handbook treats media presence during the execution of a warrant as a safety risk, not a safety enhancement. Criminal Justice Council, *Model Rules of Law Enforcement: A Manual on Police Discretion* § 4.02, at 257-58 (1974). Sheriff Kight also viewed the presence of civilians during the execution of warrants as posing safety risks. C.A.J.A. 147. Respondent Perkins testified that having the media around was a safety concern and akin to a "baby-sitting type situation," with the officers serving as the baby-sitters. C.A.J.A. 130, 133. Respondents have not cited any treatises or law enforcement manuals that recommend bringing along photographers or reporters to protect officer safety when they enter private homes to effectuate an arrest.

With respect to the interest in preserving a record, we think it is fair to say that experience has shown that the media is unlikely to turn over the unpublished fruits of its newsgathering efforts so that they could be used for a government purpose. We also trust that the reasonable law enforcement officer knows this. Respondents could have created their own photographic record if they thought it served an important law enforcement role. Officers who wish to preserve a video or photographic record for evidentiary purposes would logically seek to do so by using personnel under police control and not by bringing in independent members of the news media. A reasonable officer would hardly think it worth the candle to use media personnel to preserve an accurate record that could only be obtained, if at all, after First Amendment litigation. There is no evidence of any agreement between respondents and *The Washington Post* that could lead one to conclude otherwise.



In the end, there is just no basis for a reasonable law enforcement official to conclude that media presence served any purpose related to accomplishing the objective of the warrant here. This case is thus far outside those that involve private individuals actually assisting in the execution of a warrant.

### C. The Substantial Majority Of Courts Have Found That This Conduct Violates Clearly Established Law

Eight federal courts have concluded that the conduct at issue here is so clearly unconstitutional that, even in the complete absence of case law specifically saying so, qualified immunity is inappropriate.[6] Three courts have disagreed.[7] The dispute that has resulted in this 8-to-3 split is not over whether this conduct is constitutional or unconstitutional, but over whether it is clearly unconstitutional or not clearly unconstitutional. Precisely none of the judges that have addressed the qualified immunity

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[6] *See Berger v. Hanlon*, 129 F.2d 505 (9th Cir. 1997), *cert. granted*, 119 S.Ct. 403 (1998); *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 115 S.Ct. 1689 (1995); *Swate v. Taylor*, 12 F.Supp.2d 591 (S.D. Tex. 1998); *Barrett v. Outlet Broadcasting, Inc.*, 22 F.Supp.2d 726 (S.D. Ohio 1997); *Parker v. Clarke*, 905 F.Supp. 638 (E.D. Mo. 1995), *rev'd sub nom. Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 1081 (1997); *Hagler v. Philadelphia Newspapers, Inc.*, C.A. No. 96-2154, 1996 WL 408605 (E.D. Pa. July 12, 1996); J.A. 46 (district court Dec. 4, 1995 opinion in this case); *Ayeni v. CBS*, 848 F.Supp. 362 (E.D.N.Y. 1994), *aff'd sub nom. Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 115 S.Ct. 1689 (1995).

[7] *See* Pet. App. 1a; *Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 1081 (1997); *Berger v. Hanlon*, No. CV-95-46-BLG-JDS, 1996 WL 376364 (D. Mont. Feb. 26, 1996), *rev'd*, 129 F.2d 505 (9th Cir. 1997), *cert. granted*, 119 S.Ct. 403 (1998).

question presented here have found this conduct to be constitutional, while a full 18 have found it to be *clearly unconstitutional*.[8]

Respondents are thus wrong when they say that "the lower courts are still divided on the underlying constitutional issue" and, more specifically, that the Eighth Circuit "split on the issue" in *Parker v. Boyer*. Br. for Fed. Resp'ts at 42; *see also* Br. for State Resp'ts at 32. The *Parker* panel never reached the constitutional issue, prompting Judge Rosenbaum to concur specially to express his view that the court *should have* reached the constitutional issue to find this conduct unconstitutional. *See Parker*, 93 F.3d at 448 (Rosenbaum, J., concurring specially) ("In my view, our jurisprudence demands a first determination of whether the claim constitutional right, in fact, exists. We have missed this required first step in the qualified immunity analysis."). The majority below also declined to address the constitutional issue and was careful to point out that it was not condoning this conduct: "We stress that we do not address whether the officers' conduct was constitutional or appropriate." Pet. App. 17a.[9]

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[8] These 18 judges include Judge Donald Russell, who dissented from the original panel opinion in this case but died before the *en banc* court's 6-to-5 vote, the 5 dissenters below, and the 12 judges on the courts listed in footnote 6.

[9] The federal respondents provide a string cite listing decisions in eight cases where government officials permitted the media to be present on private property. They then write, "In none of these cases was such conduct found to have violated the Fourth Amendment." Fed. Resp'ts Br. at 15. Notwithstanding the implication to the contrary, the Fourth Amendment was not addressed in at least four of the decisions cited. *See Rogers v. Buckel*, 615 N.E. 2d 669 (Ohio Ct. App. 1992); *Magenis v. Fisher Broadcasting, Inc.*, 789 P.2d 1106 (Or. Ct. App. 1990); *Miller v. NBC*, 187 Cal. App. 3d 1463 (1986); *Anderson v. WROC-TV*, 441 N.Y. 2d 220 (Ct. App. 1981). In a fifth case cited, *Scott v. Florida*, 559 So. 2d 269 (Fla. Ct. App. 1990), the court concluded that suppression of evidence was not an appropriate remedy but, significantly, then stated that this conclusion "should not be construed as an opinion on appellant's argument that the presence of the television crew infringed upon his right to privacy." 559 So. 2d at 272. *See also New Jersey v. Harris*, 237 A.2d 887, 889 (N.J. Super. Ct. App. Div. 1968) (denying motion to suppress but concluding that media presence "may well be a breach of proprieties and, if established may render liable those responsible for such breach."). The three other cases cited by respondents are discussed in our opening brief. *See* Pet'rs Br. at 42-44 (discussing *Moncrief v. Hanton*, 10 Med. L. Rptr. 1620 (N.D. Ohio 1984); *Higbee v. Times-Advocate, Inc.*, 5 Med. L. Rptr. 2372 (S.D. Cal. 1980); *Prahl v. Brosamle*, 295 N.W. 2d 768 (Wis. Ct. App. 1980)).



## II. THE ONLY EFFECTIVE REMEDY FOR FOURTH AMENDMENT ABUSES IS A FOURTH AMENDMENT REMEDY

Respondents argue that common law remedies adequately protect against abuses of the sort presented here and that there is thus no need for the Court to find a Fourth Amendment violation. *See* Fed. Resp'ts Br. at 32-33. This is precisely the argument that the Court rejected in *Monroe v. Pape*, 365 U.S. 167 (1961), and in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). It is much too late in the day to argue that the Fourth Amendment was simply designed to fill in the gaps in the common law.[10] Respondents' argument also

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[10] The complaint in this case sought relief under both *Bivens* and 42 U.S.C. § 1983. The district court found respondents to be acting under color of federal law, not state law, and dismissed the Wilsons' § 1983 claims before discovery commenced. We think this was error. In our view, an officer can be acting under "color of state law" even if it can also be said that he was acting under color of federal law. The district court

confuses the remedy and the wrong. Not surprisingly, respondents point to no authority to support the odd notion that the existence of a constitutional right depends upon the absence of adequate non-constitutional remedies.

Furthermore, this Court already held that Federal Tort Claims Act ("FTCA") relief is not an adequate substitute for *Bivens* relief. *Carlson v. Green*, 446 U.S. 14 (1980), identified four reasons why an FTCA action is not a satisfactory substitute. First, because a *Bivens* remedy is recoverable against an individual, it is a more effective deterrent than the FTCA remedy, which is recoverable against the United States. 446 U.S. at 21. Second, the deterrent effect is weaker under the FTCA because it prohibits recovery of punitive damages. *Id.* at 21-22. Third, a plaintiff cannot opt for a jury trial in an FTCA action.[11] *Id.* at 22. Fourth, "an action under FTCA exists only if the State in which the alleged misconduct occurred would permit a cause of action for that misconduct to go forward." *Id.*

With respect to this fourth point, it is important to recognize that under Maryland law, "state personnel" are immune from liability for a tort unless their actions are malicious, grossly negligent, or outside the scope of their

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treated the issue as an either/or proposition. This issue, however, remains before the district court, and the district court's order "is subject to revision at any time before the entry of judgment. . . . " Fed R. Civ. P. 54(b).

[11] At the time of the Fourth Amendment's adoption, "Americans enthusiastically embraced the role of the civil jury in government search and seizure cases." Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles* 14 (1997).



public duties. Md. Code Ann., Courts and Judicial Proceedings § 5-522(b) (1998). "State personnel" is defined to include "a sheriff or deputy sheriff of a county." Md. Code Ann., State Government § 12-101(a)(6) (Supp.1998).

Also, under the FTCA recovery may be barred altogether if the claim arises from a "discretionary function" or "the execution of a statute or regulation, whether or not such statute or regulation be valid." 28 U.S.C. § 2680(a). Respondents argue in their brief that taking people into private dwellings is part of "[t]he discretion that officers are afforded when they execute a warrant." Fed. Br. at 12. If a court accepts this argument, the Wilsons could be barred from recovery.

Finally, in the brief in support of its motion for summary judgment below, the United States argued that under Maryland trespass and invasion of privacy law respondents' conduct was privileged because they were acting pursuant to a valid arrest warrant. *See* Mem. in Supp. of Def. United States' Mot. for Partial Summ J. at 12-13. Although petitioners do not believe this argument will prevail, absent a holding from this Court that respondents violated petitioners' Fourth Amendment rights, it could prevail and leave petitioners without any remedy.

## III. REVERSAL OF THE DECISION BELOW WILL HAVE NO SIGNIFICANT IMPACT ON LAW ENFORCEMENT OR PUBLIC INTERESTS

We do not dispute that, as a general matter, legitimate law enforcement and public interests may be served by having the press riding along with law enforcement officials and reporting on their activities, but we think a simple rule requiring that consent first be obtained before law enforcement officials bring the media into an area

protected by the Fourth Amendment will have no significant impact on those interests. If an individual is concerned about law enforcement abuse, that individual may consent to allowing the media to be present. As respondents and the media *amici* all accept, however, law enforcement officials can simply refrain from asking the media to accompany them when they plan to misbehave. So we do not accept that giving the police the discretion to invite the media into private homes will deter misconduct. We think it as likely that law enforcement officials will pour on the swagger when the media is around.[12]

The brief filed by the media *amici* bolsters our view that reversal of the decision below will have no significant impact on reporting. The media *amici* identify six examples of valuable reporting that they fear will be barred if the Court reverses the decision below, but their descriptions of those examples do not indicate whether the media entered any areas protected by the Fourth

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[12] Many police departments and law enforcement officials around the country frown on media ride-alongs for just this reason. *See, e.g., Profile: Citizens' Rights to Privacy Against Television Rights Under First Amendment* (CBS Evening News, Jan. 4, 1999) (reporting that fire and police departments are saying "no thanks" to camera crews and quoting San Diego Police Department spokesperson on camera as saying, "We don't want our officers playing to the cameras. We don't need that."); Michael Kelley, *Omaha Police Not on 'COPS'*, Omaha World Herald, Jan. 12, 1995, at 11SF (quoting Omaha Police Department spokesperson as saying, "The tendency in some shows is for officers to ham it up for the camera or act in a manner that's not normal."); *see also* Richard Zoglin, *The Cops and the Cameras*, Time, Apr. 6, 1992, at 62 (reporting that Chicago Police Department does not allow camera crews in squad cars).



Amendment.[13] We were only able to obtain five of the six examples cited by *amici*, but of those five we can confirm that none appeared to involve conduct that ran afoul of the Fourth Amendment. Two involved print reporters riding along with police, but reporting on events that occurred in public places.[14] A television program covered a sting operation that took place in an office run by undercover detectives.[15] Another television program showed what was purported to be a "sweat shop," but the owner of the place was interviewed on camera and (presumably) did so consensually.[16] A third television program shows homicide detectives going in and out of private dwellings but with the camera crew never following them inside.[17]

There are many ways for law enforcement officials to publicize their efforts and many ways for the media to report on those efforts without barging into homes without the occupants' consent. A simple requirement that consent first be obtained, we trust, will only marginally affect those efforts while ensuring that everyone remains

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[13] *See* Br. *Amici Curiae* of ABC, Inc., *et al.* at 5 nn.4-7.

[14] *See* Gordon Dillow, *Fuhrman's Fallout Makes Streets That Much Meaner for LAPD*, Orange County Register, Sept. 10, 1995, at A1; Jeff Leeds & Nicholas Riccardi, *Missing Molester Tracked Down*, L.A. Times, Jan. 31, 1997, at B1.

[15] *See Prime Time Live: Sorry, Wrong Number* (ABC Television broadcast, June 29, 1994).

[16] *See CNN Special Assignment: The Misery Trade* (CNN television broadcast, Dec. 5, 1993).

[17] *See ABC News Turning Point: Solving Murder Kansas City Style* (ABC television broadcast, June 29, 1994). This program also aired still shot photos of murder scenes apparently taken by police officials.

true to "the recognition of the Framers that certain enclaves . . . be free from arbitrary government interference." *Oliver v. United States*, 466 U.S. 170, 178 (1984).

## IV. CONCLUSION

The decision below should be reversed and the case remanded for trial.

Respectfully submitted,

*Of Counsel*:

STEVEN R. SHARPIRO
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500

ARTHUR B. SPITZER
American Civil Liberties Union of the National Capital Area
1400 20th Street, N.W.
Washington, D.C. 20036
(202) 457-0800

DWIGHT H. SILLIVAN
American Civil Liberties Union of Maryland
2219 St. Paul Street
Baltimore, MD 21218
(410) 889-8555

RICHARD K. WILLARD
*Counsel of Record*
DAVID H. COBURN
JAMES S. FELT
STEPTOE & JOHNSON LLP
1330 Connecticut Ave, N.W.
Washington, D.C. 20036
(202) 429-3000

RICHARD SELIGMAN
601 Indiana Avenue
Suite 910
Washington, D.C. 20004
(202) 745-7800

*Attorneys for Petitioners*

Nos. 97-1927 and 98-83

# In the Supreme Court of the United States

OCTOBER TERM, 1998

RODNEY C. HANLON, JOEL SCRAFFORD, KRIS A. MCLEAN, RICHARD C. BRANZELL, AND ROBERT PRIEKSAT,
*Petitioners,*

v.

PAUL W. BERGER AND ERMA R. BERGER,
*Respondents.*

CHARLES WILSON, GERALDINE WILSON, AND RACHEL SNOWDEN, NEXT FRIEND/MOTHER OF VALENCIA SNOWDEN, A MINOR,
*Petitioners,*

v.

HARRY LAYNE, JAMES A. OLIVIO, JOSEPH L. PERKINS, MARK A. COLLINS, ERIC E. RUNION, AND BRIAN E. ROYNESTAD,
*Respondents.*

**On Writ of Certiorari to the United States Courts of Appeals for the Ninth and Fourth Circuits**

## BRIEF *AMICI CURIAE* OF ABC, INC., *ET AL.* IN SUPPORT OF PETITIONERS IN NO. 97-1927 AND RESPONDENTS IN NO. 98-83.

*(Additional Amici Listed on Inside Cover)*

LEE LEVINE
*Counsel of Record*
JAMES E. GROSSBERG
JAY WARD BROWN
LEVINE SULLIVAN & KOCH, L.L.P.
1050 Seventeenth Street N.W.
Suite 800
Washington, D.C. 20036
(202) 508-1100
*Counsel for Amici Curiae*
*(Additional counsel listed on inside pages)*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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A.H. BELO CORPORATION;
ALLIED DAILY NEWSPAPERS OF WASHINGTON, INC.;
AMERICAN SOCIETY OF NEWSPAPER EDITORS;
THE ASSOCIATED PRESS;
CALIFORNIA NEWSPAPER PUBLISHERS
ASSOCIATION; CBS BROADCASTING INC.;
THE COPLEY PRESS, INC.; DOW JONES & CO., INC.;
FOX TELEVISION STATIONS, INC.;
GANNETT CO., INC.; THE HEARST CORPORATION;
KING WORLD PRODUCTIONS, INC.;
THE LOS ANGELES TIMES;
MAGAZINE PUBLISHERS OF AMERICA, INC.;
THE McCLATCHY COMPANY;
NATIONAL ASSOCIATION OF BROADCASTERS;
NATIONAL BROADCASTING COMPANY, INC.;
NEWSPAPER ASSOCIATION OF AMERICA, INC.;
THE NEW YORK TIMES COMPANY; THE ORANGE
COUNTY REGISTER, A DIVISION OF FREEDOM
COMMUNICATIONS, INC.; THE REPORTERS
COMMITTEE FOR FREEDOM OF THE PRESS;
TRIBUNE COMPANY; UNIVISION COMMUNICATIONS,
INC.; THE WASHINGTON POST; AND WASHINGTON
STATE ASSOCIATION OF BROADCASTERS

*Of Counsel:*

HENRY S. HOBERMAN
JEFFREY D. FROST
ABC, INC.
77 West 66th Street
New York, New York 10023
(212) 456-6371
*Counsel for ABC, Inc.*

MICHAEL MCCARTHY
A.H. BELO CORPORATION
400 South Record Street
Dallas, Texas 75202
(214) 977-8249
*Counsel for*
*A.H. Belo Corporation*

RICHARD M. SCHMIDT, JR.
KEVIN M. GOLDBERG
COHN AND MARKS
1920 N Street, N.W.
Suite 300
Washington, D.C. 20036
(202) 293-3860
*Counsel for*
*the American Society of*
*Newspaper Editors*

RICHARD N. WINFIELD
ROGERS & WELLS
200 Park Avenue
New York, New York 10017
(212) 878-8233
*Counsel for*
*The Associated Press*

THOMAS NEWTON
JAMES W. EWERT
CALIFORNIA NEWSPAPER
PUBLISHERS ASSOCIATION
1225 8th Street, Suite 260
Sacramento, California 95814
(916) 443-5991
*Counsel for*
*California Newspaper*
*Publishers Association*

SUSANNA M. LOWY
CBS BROADCASTING INC.
51 West 52nd Street
New York, New York 10016
(212) 975-8758
*Counsel for*
*CBS Broadcasting Inc.*

HAROLD W. FUSON, JR.
JUDITH L. FANSHAW
THE COPLEY PRESS, INC.
7776 Ivanhoe Avenue
Post Office Box 1530
La Jolla, California 92037-1530
(619) 454-0411
*Counsel for*
*The Copley Press, Inc.*

STUART D. KARLE
DOW JONES & CO., INC.
200 Liberty Street
New York, New York 10281
(212) 416-2000
*Counsel for*
*Dow Jones & Co., Inc.*

GERALD FRIEDMAN
DENNIS F. HERNANDEZ
FOX TELEVISION STATIONS, INC.
1999 South Bundy Drive
Los Angeles, California 90025
(310) 584-3340
*Counsel for*
*Fox Television Stations, Inc.*

BARBARA WARTELLE WALL
GANNETT CO., INC.
1100 Wilson Boulevard
Arlington, Virginia 22234
(703) 284-6951
*Counsel for Gannett Co., Inc.*

ROBERT J. HAWLEY
THE HEARST CORPORATION
959 8th Avenue
New York, New York 10019
(212) 649-2050
*Counsel for*
*The Hearst Corporation*

RALPH E. GOLDBERG
KING WORLD PRODUCTIONS, INC.
1700 Broadway
New York, New York 10019
(212) 315-4000
*Counsel for*
*King World Productions, Inc.*

KARLENE W. GOLLER
THE LOS ANGELES TIMES
Times Mirror Square
Los Angeles, California 90053
(213) 237-3760
*Counsel for*
*The Los Angeles Times*

JERRY S. BIRENZ
SLADE R. METCALF
c/o MAGAZINE PUBLISHERS OF AMERICA, INC.
919 Third Avenue
New York, New York 10022
(212) 692-4457
*Counsel for*
*Magazine Publishers of America, Inc.*

KAROLE MORGAN-PRAGER
DEBRA O. FOUST
THE MCCLATCHY COMPANY
2100 Q Street
Sacramento, California 95816
(916) 321-1826
*Counsel for*
*The McClatchy Company*

HENRY L. BAUMANN
JACK N. GOODMAN
STEVEN A. BOOKSHESTER
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036-2891
(202) 429-5430
*Counsel for*
*National Association of Broadcasters*

JON FINE
NATIONAL BROADCASTING COMPANY, INC.
30 Rockefeller Plaza
New York, New York 10112
(212) 664-4444
*Counsel for*
*National Broadcasting Company, Inc.*

DAVID S.J. BROWN
RENÉ P. MILAM
NEWSPAPER ASSOCIATION OF AMERICA, INC.
1921 Gallows Road, Suite 600
Vienna, Virginia 22182-3900
(703) 902-1815
*Counsel for*
*Newspaper Association of America, Inc.*

GEORGE FREEMAN
THE NEW YORK TIMES COMPANY
229 West 43rd Street
New York, New York 10036
(212) 556-1558
*Counsel for*
*The New York Times Company*

JANE E. KIRTLEY
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
Suite 1910
1101 Wilson Boulevard
Arlington, Virginia 22209
(703) 807-2100
*Counsel for*
*The Reporters Committee for Freedom of the Press*

DALE M. COHEN
CHARLES J. SENNET
TRIBUNE COMPANY
435 North Michigan Avenue
Chicago, Illinois 60611
(312) 222-3232
*Counsel for Tribune Company*

SYLVIA R. ESQUIVEL
RACHELLE MARIE BIN
UNIVISION COMMUNICATIONS, INC.
6701 Center Drive West
Los Angeles, California 90045
(310) 338-0700
*Counsel for Univision Communications, Inc.*

MARY ANN WERNER
THE WASHINGTON POST
1150 15th Street, N.W.
Washington, D.C. 20071
(202) 334-6000
*Counsel for*
*The Washington Post*

MARK ALLEN
WASHINGTON STATE ASSOCIATION OF BROADCASTERS
724 Columbia Street, N.W.
Suite 310
Olympia, Washington 98501-1249
(360) 705-0774
*Counsel for*
*Washington State Association of Broadcasters*

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# In the Supreme Court of the United States

OCTOBER TERM, 1998

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Nos. 97-1927 and 98-83

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RODNEY C. HANLON, JOEL SCRAFFORD, KRIS A. MCLEAN, RICHARD C. BRANZELL, AND ROBERT PRIEKSAT,
*Petitioners,*

v.

PAUL W. BERGER AND ERMA R. BERGER,
*Respondents.*

---

CHARLES WILSON, GERALDINE WILSON, AND RACHEL SNOWDEN, NEXT FRIEND/MOTHER OF VALENCIA SNOWDEN, A MINOR,
*Petitioners,*

v.

HARRY LAYNE, JAMES A. OLIVIO, JOSEPH L. PERKINS, MARK A. COLLINS, ERIC E. RUNION, AND BRIAN E. ROYNESTAD,
*Respondents.*

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**On Writ of Certiorari to the United States Courts of Appeals for the Ninth and Fourth Circuits**

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**BRIEF *AMICI CURIAE* OF ABC, INC., *ET AL.* IN SUPPORT OF PETITIONERS IN NO. 97-1927 AND RESPONDENTS IN NO. 98-83**

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## INTEREST OF THE *AMICI CURIAE*[1]

*Amici* and their members are publishers, broadcasters, editors and reporters working throughout the United States to gather news and information and to disseminate it to the American public by, among other means, observing public officials—including law enforcement officers—as they perform their governmental functions. *See* Appendix A *infra*. The decision below in *Berger v. Hanlon* effectively condemns this form of news reporting and, unless reversed by this Court, will impair the role of *amici* in "ensur[ing] an informed citizenry, vital to the functioning of a democratic society." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

## SUMMARY OF ARGUMENT

In *Berger v. Hanlon*, 129 F.3d 505 (9th Cir. 1997), the Ninth Circuit has held that, for all practical purposes, the news media's presence during the execution of a search warrant is *per se* unreasonable and, therefore, a violation of the Fourth Amendment. In so holding, the Ninth Circuit has unnecessarily degraded the public's interest—long-recognized by this Court as one of constitutional dimension—in monitoring the work of its law enforcement institutions. By observing and recording first-hand the activities of government officials charged with enforcing the law, including the execution of search warrants, the news media afford the public a unique window through which to observe the conduct of those officials, the operation of the statutes and ordinances they enforce, and the social conditions they confront. If the *per se* rule embraced in *Berger*, and endorsed by the dissenters in *Wilson*

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party to this action authored any portion of this brief *amici curiae* and that no person or entity, other than *amici*, made a monetary contribution to the preparation or submission of this brief. Written consent of all parties to the filing of this brief *amici curiae* has been filed with the Clerk of the Court, as required by Supreme Court Rule 37.3(a).



*v. Layne*, 141 F.3d 111, 119 (4th Cir. 1998) (en banc) (Murnaghan, J., dissenting), is adopted by the Court, this window will effectively be closed.

To be sure, the search or seizure of a citizen's home, person, papers or other possessions by agents of the government may intrude substantially upon that citizen's privacy, and the consequences of the abuse of such power may be profound. Yet, the Ninth Circuit's *per se* rule would eliminate a most effective means by which the public may observe this invocation of governmental authority and thereby prepare itself to confront such abuses. A *per se* rule affords no weight at all to this important interest in striking the constitutional balance with the incremental diminution of privacy that may result from the news media's presence at a warrant's execution. Accordingly, this Court should reverse the judgment in *Berger*, affirm the judgment in *Wilson*, and decline to hold that law enforcement officers *necessarily and always* violate the Fourth Amendment by permitting the news media to observe and record their activities.

## ARGUMENT

### I. A RULE THAT IT IS UNREASONABLE *PER SE* TO PERMIT THE PRESS TO OBSERVE THE EXECUTION OF A SEARCH WARRANT WILL UNNECESSARILY DEPRIVE THE PUBLIC OF VALUABLE INFORMATION ABOUT THE FUNCTIONING OF ITS GOVERNMENT

In *Berger v. Hanlon*, the Ninth Circuit held that, although the search at issue there comported with the Constitution in all other respects, *see* 129 F.3d at 509, it nevertheless violated the Fourth Amendment because the news media accompanied and observed law enforcement officials as they executed a warrant, *see id.* at 510-11.[2] In contrast, five members of the *en banc* majority in

[2] *See also Ayeni v. Mottola*, 35 F.3d 680, 686 (2d Cir. 1994) (holding that "an objectively reasonable officer could not have concluded

*Wilson v. Layne* determined that "reasonable law enforcement officers might conclude" that permitting newspaper reporters "to observe and photographically record the execution of an arrest warrant" would serve, *inter alia*, the salutary purpose of "facilitating accurate reporting that improves public oversight of law-enforcement activities." 141 F.3d at 116.[3]

The Ninth Circuit's holding, if adopted by this Court, will have one certain consequence: To avoid the risk that they will be deemed to have violated the Fourth Amendment, law enforcement and other public officials performing their duties will simply bar the public, through the news media, from observing their activities in a variety of settings. Such a regime will eliminate a class of news reporting that has contributed meaningfully to public scrutiny of official conduct. First-hand observations by the public, through the news media, of law enforcement searches and seizures—ranging from police raids on "crack houses," to inspections by fire marshals of overcrowded sweat shops, to health department examinations of roach-infested restaurant kitchens—provide the public with a

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that inviting a television crew—or any third party not providing assistance to law enforcement—to participate in a search was in accordance with Fourth Amendment requirements"); *Hagler v. Philadelphia Newspapers, Inc.*, 24 Media L. Rep. (BNA) 2332, 2334 (E.D. Pa. July 12, 1996) (adopting and quoting reasoning in *Ayeni*); *but see Bills v. Aseltine*, 52 F.3d 596, 602 (6th Cir. 1995) (criticizing *Ayeni* for its "failure to define narrowly the right allegedly violated, instead describing the violation in abstract and general terms").

[3] *See also Parker v. Boyer*, 93 F.3d 445, 447 (8th Cir. 1996) (concluding that it is not "self-evident that the police offend general fourth-amendment principles when they allow members of the news media to enter someone's house during the execution of a warrant"), *cert. denied*, 117 S. Ct. 1081 (1997); *Stack v. Killian*, 96 F.3d 159 (6th Cir. 1996) (where warrant made no mention of news media but authorized police to videotape search, subject's rights were not violated when police invited news media along and permitted them to make their own videotape of search).



rare opportunity to monitor and evaluate the conduct of these officials.[4] Such reporting informs the public, in a way no other kind of journalism realistically can, about the assertedly unlawful conduct at which enforcement efforts are directed,[5] the difficulties and dangers facing law enforcement officers,[6] the legal restrictions that confine their discretion, and the social ills they seek to redress.[7]

This Court has repeatedly recognized that our constitutional democracy presupposes and, indeed, requires an informed public. As the Court has observed, "the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *First National Bank of Boston v.*

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[4] *See, e.g., ABC News Turning Point: Solving Murder Kansas City Style* (ABC television broadcast, June 29, 1994) (observing work of detective squad for one month as means of reporting on ability of police to solve murders); *CBS News Special: 48 Hours on Crack Street* (CBS television broadcast, Sept. 2, 1986) (observing law enforcement officers during two-day period to document how they grapple with "crack" cocaine problem).

[5] *See, e.g., Prime Time Live: Sorry, Wrong Number* (ABC television broadcast, Sept. 25, 1996) (observation of state and federal agents investigating scheme involving cell phones programmed with stolen identification numbers and methods for consumers to avoid them).

[6] *See, e.g.*, Gordon Dillow, *Fuhrman's Fallout Makes Streets That Much Meaner For LAPD*, Orange County Register, Sept. 10, 1995, at A1 (reporter who accompanied policeman on duty documented reactions of citizens to law enforcement officers); Jeff Leeds & Nicholas Riccardi, *Missing Molester Tracked Down*, L.A. Times, Jan. 31, 1997, at B1 (reporter who accompanied police on execution of arrest warrant documented obstacles to location and apprehension of sex offenders).

[7] *See, e.g., CNN Special Assignment: The Misery Trade* (CNN television broadcast, Dec. 5, 1993) (CNN journalists who accompanied law enforcement officers on raids of sweat shops documented illegal conditions to which unskilled laborers were subjected).

*Bellotti*, 435 U.S. 765, 783 (1978). "In a variety of contexts, this Court has referred to a First Amendment right to 'receive information and ideas.'" *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972). To secure that right, the American public "relies necessarily upon the press" to inform it about the conduct of government. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975).

News reporting about the operations of government officials charged with administering the law provides both a catalyst and the raw material for the "'free discussion of governmental affairs.'" *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). The *per se* rule adopted by the Ninth Circuit and embraced by the dissenters in *Wilson* would effectively eliminate an important journalistic tool and reduce the stock of information necessary "to ensure that the individual citizen can effectively participate in . . . our republican system of self-government." *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 604. Such a result, this Court has emphasized, will inevitably breed unnecessary distrust. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980) (Burger, C.J., announcing judgment).

## II. A *PER SE* RULE IGNORES THE COURTS' CONSTITUTIONAL OBLIGATION TO BALANCE COMPETING INTERESTS, INCLUDING THE PUBLIC'S NEED TO INFORM ITSELF ABOUT THE CONDUCT OF LAW ENFORCEMENT OFFICIALS

The Fourth Amendment prohibits "'not all searches and seizures,'" but only those that are "'unreasonable.'" *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (citation omitted). Ultimately, what is "reasonable" for Fourth Amendment purposes "depends 'on a balance between the public interest and the individual's right to personal security free from



arbitrary interference by law officers.'" *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977) (citation omitted). This Court has cautioned that "[t]he test of reasonableness cannot be stated in absolute terms. 'Each case is to be decided on its own facts and circumstances.'" *Harris v. United States*, 331 U.S. 145, 150 (1947) (quoting *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931)), *overruled in part on other grounds, Chimel v. California*, 395 U.S. 752 (1969); *see also Wilson v. Arkansas*, 514 U.S. 927 (1995).

Similarly, this Court has assessed with skepticism rigid rules that restrict the free flow of information about the workings of government and its officials in the name of personal privacy. In *Globe Newspaper Co. v. Superior Court*, for example, the Court rejected a *"mandatory* closure rule" applicable to the trial testimony of minor victims of sexual assaults. 457 U.S. at 607-08 (emphasis in original). Although the Court acknowledged that the rule's purpose—"safeguarding the physical and psychological well-being of a minor—is a compelling one," it added that "it is clear that the circumstances of the particular case may affect the significance of the interest." *Id.* (footnote omitted). As the Court explained, "[a] trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim." *Id.* at 608. Thus, contrary to the reasoning of the *Berger* panel and the *Wilson* dissenters, privacy interests protected by the Fourth Amendment do not demand a rule that the news media's presence during the execution of a warrant is *always* unreasonable, and First Amendment considerations as well counsel that the courts should determine the issue in light of "'all the circumstances.'" *Maryland v. Wilson*, 117 S. Ct. 882, 884-85 (1997) (citation omitted).

At bottom, the Fourth Amendment is directed against the exercise of unchecked *governmental* power. *United States v. Place*, 462 U.S. 696, 706-07 (1983). The *per se* rule endorsed by the Ninth Circuit would, in many

circumstances, eliminate the only means by which the press and public can monitor abuses of that power first-hand. Concededly, media representatives are typically permitted to observe searches and seizures only at the sufferance of law enforcement officials. Even this limited opportunity for oversight—undertaken in a manner otherwise consistent with the dictates of the Fourth Amendment—is preferable to the alternative endorsed by the *Berger* panel and the *Wilson* dissenters: no possibility of any oversight at all. The information obtained by the American public from first-hand news accounts of law enforcement activity expands the base of knowledge upon which the public can evaluate claims of official impropriety. *See Wilson v. Layne*, 141 F.3d at 116 (noting reasonableness of proposition that, as a general matter, media observation and recording of execution of warrants "deters . . . improper conduct by law enforcement officers"). As this Court has observed on countless occasions, " '[w]ithout publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.' " *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 569 (Burger, C.J., announcing judgment) (quoting J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827)).

*Amici* do not contend that the presence of news media representatives during the execution of a warant is *never* relevant to whether a Fourth Amendment violation has occurred.[8] Nevertheless, for the foregoing reasons, a rule

[8] For example, in contrast to the cases now before the Court, in *Ayeni v. Mottola*, the Second Circuit found that six government agents without a warrant "pushed" their way into an apartment past a night-gown clad woman and a small child and began searching bedroom closets for evidence of credit card fraud allegedly perpetrated by the woman's husband, who was not present. 35 F.3d at 683. Some time later, four more agents armed with a warrant arrived, accompanied by a camera crew. The court found that Mrs. Ayeni objected to the presence of the camera and, when she tried to shield her son's face with a magazine, a government agent snatched it out of her hand and told her to "shut up." *Id.* According to the Second Circuit, one of the government agents then "directed" the camera crew to videotape Mrs. Ayeni's face while she was being interrogated and the cameraman complied. *Id.* Significantly, in neither of the cases before this Court did the news media permit their staff or equipment to be "directed" by government agents.



that such activities *always* violate the Fourth Amendment is neither constitutionally required nor justified. The mere observation and recording of a search by the news media, and subsequent public dissemination of what was observed, should not—without more—constitute a violation of the Fourth Amendment.[9]

[9] Even under those circumstances in which the Constitution does not preclude law enforcement officials from authorizing the news media to accompany them while executing a warrant, an aggrieved citizen remains free to assert whatever protections may be available under state tort law, including—in appropriate circumstances—causes of action for trespass or invasion of privacy. *See, e.g., Miller v. National Broadcasting Co.*, 232 Cal. Rptr. 668 (Ct. App. 1986) (permitting trespass and invasion of privacy claims against reporter who accompanied paramedics into private home during emergency medical call); *Anderson v. WROC-TV*, 441 N.Y.S.2d 220 (Sup. Ct. 1981) (permitting trespass claim against reporters who accompanied investigator as he executed search warrant); *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. Ct. App. 1980) (reinstating claim for trespass against reporter who accompanied law enforcement officers into private home during arrest); *Florida Publ'g Co. v. Fletcher*, 340 So. 2d 914 (Fla. 1976) (observing that, in absence of consent, person injured by news media's entry into home with officials following fatal fire could maintain claims for trespass and invasion of privacy, but finding implied consent from evidence at issue in case); *see also* 28 U.S.C. § 2679(b)(1) (providing that persons whose property has been injured or lost, or who have suffered personal injury as result of negligent or wrongful act of federal employee may bring damage claim against United States). Indeed, the Ninth Circuit remanded for further proceedings the trespass claims asserted in *Berger v. Hanlon*, an aspect of its decision that is not before this Court for review. *See* 129 F.3d at 517.

## CONCLUSION

For the foregoing reasons, *amici* respectfully request that the judgment in No. 97-1927 be reversed and that the judgment in No. 98-83 be affirmed.

Respectfully submitted,

LEE LEVINE
*Counsel of Record*
JAMES E. GROSSBERG
JAY WARD BROWN
LEVINE SULLIVAN &
KOCH, L.L.P.
1050 Seventeenth Street N.W.
Suite 800
Washington, D.C. 20036
(202) 508-1100
*Counsel for Amici Curiae*

# APPENDIX

## APPENDIX A

### IDENTITY OF INDIVIDUAL *AMICI CURIAE*

ABC, Inc., an indirect wholly-owned subsidiary of The Walt Disney Company, is a broad-based communications company with significant holdings here and abroad. It alone, or through its subsidiaries, owns the ABC Television Network, ten television stations and 34 radio stations.

A.H. Belo Corporation, a publicly-traded (NYSE) company, has numerous wholly-owned subsidiaries, including subsidiaries which operate the *Riverside Press-Enterprise* newspaper in Riverside, California, and KXTV in Sacramento, California; KING-TV in Seattle and KREM-TV in Spokane, Washington; and KGW-TV in Portland, Oregon.

Allied Daily Newspapers of Washington, Inc. ("Allied") is a Washington nonprofit corporation owned and operated by the 25 daily newspapers in the State of Washington, including all traditional, daily newspapers of general circulation. Allied's offices are located in Olympia, Washington. One of Allied's primary purposes is to monitor media law and join in briefs on behalf of members in courts or before administrative agencies.

The American Society of Newspaper Editors is a nationwide, professional organization of more than 850 members who hold positions as directing editors of daily newspapers throughout the United States and Canada. The purposes of the Society, which was founded over seventy-five years ago, include the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people. ASNE is committed to the proposition that, pursuant to the First Amendment, the press has an obligation to provide the citizenry of this country with complete and accurate re-

ports of the affairs of government—be they executive, legislative, or judicial.

The Associated Press ("AP"), a not-for-profit mutual news cooperative organized under the New York Not-For-Profit Corporation Law, is headquartered in New York City. The members of AP are newspapers, television stations and radio stations. Founded in 1848, and now the oldest and largest newsgathering organization in the world, AP engages in the collection of news from and distribution of news to its members.

The California Newspaper Publishers Association ("CNPA") represents approximately 500 daily and weekly newspaper members and for over 100 years has stood for the right of every individual to participate in the constitutional guarantee of freedom of expression.

CBS Broadcasting Inc., a New York corporation, is engaged in the business of producing and broadcasting nationally news and public affairs programming, and operating television and radio stations.

The Copley Press, Inc. publishes *The San Diego Union-Tribune* and other newspapers in California and Illinois, whose combined daily circulation exceeds 750,000 copies. Copley's newspapers range from a small desert semi-weekly to a large metropolitan daily, all of which serve readers intensely interested in the conduct of law enforcement agencies.

Dow Jones & Co., Inc., is the publisher, *inter alia,* of *The Wall Street Journal,* a national newspaper published each business day, the Dow Jones Financial News Services, real-time, 24-hour newswires distributed electronically to subscribers, *Barron's,* a weekly newspaper of business and finance, and, through its Ottaway Newspaper, Inc. subsidiary, 19 daily and 18 weekly newspapers.

Fox Television Stations, Inc. owns and operates 22 television stations in major markets, including KTTV in



Los Angeles. Twenty-one of the Fox television stations broadcast local news and news-related programs several times daily, which are an integral part of their schedule.

Gannett Co., Inc. is a nationwide news and information company that operates 21 television stations, which broadcast to over 16% of the U.S. Publishing 75 daily newspapers, including *USA Today*, Gannett is the nation's largest newspaper group in terms of circulation. In addition, Gannett owns a number of non-daily publications, including *USA Weekend,* a newspaper magazine, and a national wire service.

The Hearst Corporation is a diversified privately held communications company that publishes newspapers, consumer magazines, books and business publications. Hearst also owns a leading features syndicate, has interests in several cable television networks, produces movies and other programming for television and is the majority owner of Hearst-Argyle Television, Inc., a publicly held company that owns and operates numerous television broadcast stations.

King World Productions, Inc. is a leading worldwide distributor of television programming. King World produces and distributes the daily television news program "Inside Edition," which is broadcast by television stations located throughout the United States.

The Los Angeles Times is the nation's largest daily metropolitan newspaper with a circulation of more than 1,095,000 daily and 1,385,000 on Sunday.

Magazine Publishers of America, Inc. ("MPA") is a national trade association including in its present membership approximately 200 domestic magazine publishers who publish over 1200 magazines sold at newsstands and by subscription. MPA members provide broad coverage of domestic and international news in weekly and biweekly publications, and publish weekly, biweekly and monthly publications covering consumer affairs, law, literature,

religion, political affairs, science, agriculture, industry and many other interests, avocations and pastimes of the American people.

The McClatchy Company publishes 11 daily newspapers and 13 community newspapers in California, Washington, Alaska, Minnesota, North Carolina and South Carolina, including *The Sacramento Bee, The News Tribune* in Tacoma, the *Anchorage Daily News,* the *Star Tribune* in Minneapolis, *The News & Observer* in Raleigh, and *The Herald* in Rock Hill. The newspapers have a combined average paid circulation of 1,364,000 daily and 1,855,000 Sunday.

The National Association of Broadcasters ("NAB"), organized in 1922, is a non-profit incorporated trade association that serves and represents radio and television stations and networks. NAB's members cover, produce and broadcast the news to the American people. NAB seeks to preserve and enhance its members' ability to freely disseminate information concerning the activities of government and other matters of public interest and concern.

National Broadcasting Company, Inc. ("NBC") operates a national television network of more than 200 affiliates and 13 owned-and-operated stations that broadcast its programming throughout the United States. NBC reports on matters of general public concern through its Network News Division (which produces, among other programming, *Nightly News with Tom Brokaw, Today,* and *Dateline NBC*) as well as its cable news networks, MSNBC and CNBC.

The Newspaper Association of America, Inc. ("NAA") is a nonprofit organization representing the interests of more than 1,700 newspapers in the United States and Canada. Most NAA members are daily newspapers, accounting for approximately 87 percent of the U.S. daily newspaper circulation. One of NAA's key strategic priorities is to advocate and support newspapers' First Amend-



ment interests, including the ability to gather and report news and information of public concern.

The New York Times Company publishes *The New York Times, The Boston Globe* and 21 other newspapers. The Company also owns eight television stations and a number of sports magazines.

The Orange County Register, a division of Freedom Communications, Inc., publishes a daily newspaper in Santa Ana, California, with a circulation of more than 350,000.

The Reporters Committee for Freedom of the Press is a voluntary unincorporated association of working reporters and editors, dedicated to defending the First Amendment and freedom of information interests of the news media and the public. The Reporters Committee has provided representation, legal guidance and research in virtually every major press freedom case that has been litigated in the United States since 1970.

Tribune Company is a diversified news, information and entertainment company based in Chicago. Among other things, it operates sixteen television stations, four radio stations and a regional cable news service, it publishes four daily newspapers, and produces nationally-syndicated radio and television programs.

Univision Communications Inc. is the leading Spanish language television broadcaster in the United States. Univision owns and operates 13 full power stations in major markets, including Los Angeles, San Francisco, New York, Chicago and Miami. In addition, Univision owns and operates eight low power stations. More than two-thirds of Hispanics in the United States speak Spanish in the home. News broadcasts are a vital component of Univision's overall television programming and it is expected that Univision will continue to be the leading source of news for Hispanic Americans.

The Washington Post, a daily newspaper of general circulation primarily in Virginia, Maryland and Washington, D.C., is a division of The Washington Post Company, a communications company that owns publications and broadcast properties engaged in newsgathering and reporting.

The Washington State Association of Broadcasters represents all of the radio and television stations licensed to communities within the State of Washington. The Association represents broadcasters' news reporters on issues relating to their ability to report on issues of public importance. An adverse ruling in this case would significantly impair the ability of news reporters of broadcast stations in Washington State to cover issues surrounding effective law enforcement within their communities. Law enforcement activities constitute a substantial portion of the news covered by broadcast journalists in Washington and, as such, these issues are likely to arise on a continuing basis.